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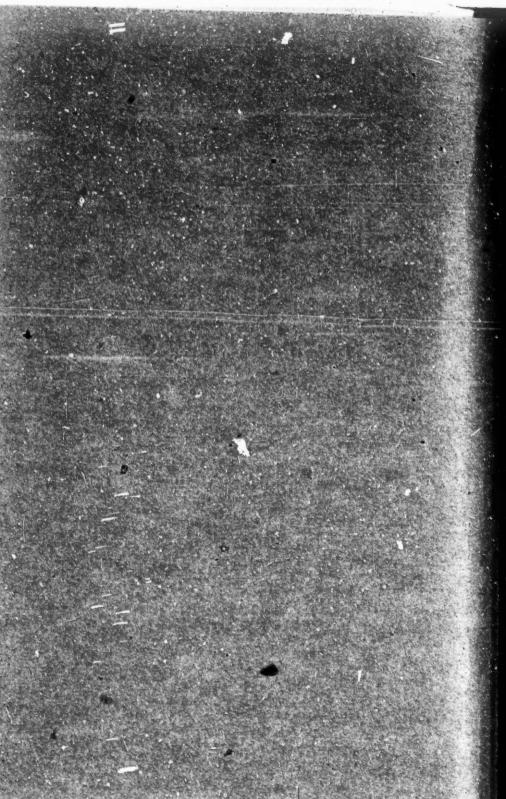
KELLOGG COMPANY, PETITIONER.

200

NATIONAL BISCUIT COMPANY,

OF APPEALS FOR THE UNITED STATES CINCUIT OCURT

80







INDEX

	Vol.	Page
Docket Entries	I	. 1
Bill of Complaint	1.	5
Answer	I	27
Plaintiff's Reply to Defendant's Affirmative Defense	1	49
Plaintiff's Interrogatories and Defendant Thiswers Thereto	. I.	65
Exhibits Annexed to Plaintiff's Interrogatories.	4	
1-Kellogy's Whole Biscuit Carton Showing Dish With		
Two Biscuits, Adopted in 1930		***
2—Kellogg's Shredded Wheat Biscuit Carton Used in 1927		
3-Kellogg's Shredded Wheat Biscuit Carton Used in		
1928	.*	
4-Kellogg's Whole Wheat Biscuit Carton First Used	**	
in 1930		
5-Kellogg's Whole Wheat Biscuit Carton First Used		***
in September, 1932		
6-Letter, January 14, 1922, Kellogg Toasted Cornflake		***
Co. to	1	103
7-Letter, January 19, 1922, The Shredded Wheat Com-	-	100
pany to Kellogg Toasted Corn Flake Company	I	103
8-Letter, April 8, 1927, Breed, Abbott & Morgan to		100
Kellogg Company	I	104
9-Letter, April 22, 1927, W. H. Crichton Clarke to		
Breed, Abbott & Morgan	1	106
10-Letter, May 10, 1927, Breed, Abbott & Morgan to		
W. H. Crichton Clarke	·I	107
11-Letter, May 16, 1927, W. H. Crichton Clarke to		
Breed, Abbott & Morgan	I	109
12-A to 12-PP-Advertisements of Defendant's Whole		
Wheat Biscuit	1	.111
13-A to 13-C-Advertising Panels or Displays of De-		
fendant's Whole Wheat Biscuit	I	155
14-A to 14-EE-Miscellaneous Advertisements of De-	6	
fendant's Biscuits	I	161
Opinion of the Court	1	193
Final Decree	1	228
Petition for Appeal	Ι.	229
Assistant of Farms	T	230

Order Allowing Appeal Vol.	Page
and our Appeal	239
Citation I	239
Record of Proceedings at Trial I	243
and the second of the second o	245
***************************************	2041
of Law	
Tangeriot of Dannel	2049
The state of Addition of Addition	2063
	,
Clerk's Certificate	2065
DI ATMAYANA	2066
Abramson, Samuel— PLAINTIFF'S WITNESSES.	
Direct Examination	
Cross-Examination I	369
Adrian, Harry—	370
Direct Evanisation	
Direct Examination	384
Cross-Examination I	386
Re-Direct Examination	386
Aitken, Alexander-	387
Direct Examination	635
Aitken, Alexander (Continued)— Re-Direct Examination Re-Cross-Examination	-636
Re-Direct Francisco	
Re-Cross-Franciscation	637
The state of the s	637
Re-Direct Examination I	638
Direct Examination	460
Cross-Examination I Anderson, Mrs. R. E.—	460
Direct Francisco	
Direct Examination II	790
Cross-Examination II	793
Re-Direct Examination II	795
Re-Cross-Examination	796

D	A—Continued.	37:4	
Baird, Patrick S		Vol.	Page
	***************************************	11	734
	********************	II	736
	***************************************	II	737
	****************	II	
Barrett, Miss Elizabeth C			
	*********	I	360
		1	
Beck, Joseph F.—	3		
	*	II	699
		II	703
Re-Direct Examination		п	708
Re-Cross-Examination		iı	709
Re-Direct Examination		II	711
Re-Cross-Examination		11	712
Re-Direct Examination	• • • • • • • • • • • • • • • • • • • •	II	712
Re-Cross-Examination	***************************************	II	713
Re-Direct Examination		II	714
Bell, James F.—			
Direct Examination	4	II	es:344
Cross-Examination	*************************	II	947
Re-Direct Examination		II	955
Re-Cross-Examination		II	956
Bender, Hannah-			
Direct Examination		.I	618
Cross-Examination		1	618
Berman, Charles-			7
Direct Examination		1	615
Cross-Examination		I,	616
Re-Direct Fxamination		I	617
Re-Cross-Examination		I	617
Re-Direct Examination		I	. 617
Bernard, Florence-			,
Direct Examination		I	480
Cross-Examination		I	481

INDEX-Combust

Black, James Lee-	Vol.	Page
Direct Examination		436
Cross-Examination	I	437
Re-Direct Examination	· II	
Re-Cross-Examination	1	
Blais, Frederick E.—	•	- 410
Direct Examination	I	403
Cross-Examination	I	404
Bohnet, William John-	1	404
Direct Examination		
Cross-Examination	I	644
Born, George J.—	·I	646
Direct Examination	-	1
	II	747
Cross-Examination	II	748
Re-Direct Examination Re-Cross-Examination	II	750
Re-Direct Examination	II	750
Re-Cross-Examination	II	753
Re-Direct Examination	II	753
	II	754
	II	754
Borneman, George John— Direct Examination		
	I	446
Cross-Examination	1	446
	.1	.447
Re-Cross-Examination	I	. 447
Brace, Clayton K.—		
Direct Examination	II	985
Cross-Examination	II	987
Re-Direct Examination	II	993
Bradbury, Ernest—		
Direct Examination	I	407
Cross-Examination	I	410
Brakel, Lewis H.—		
Direct Examination	II	979
Cross-Examination	II	981
Re-Direct Examination	II	981
Re-Cross-Examination	II	981

		Vol.	Page
Bra	nson, Jes C.—		
•.	Direct Examination	11	942
	Cross-Examination	. 11	944
Bra	un, Alfred F.—		
	Direct Examination	I	415
	Cross-Examination	1	415
	Re-Direct Examination	I	416
	· Re-Cross-Examination	I	416
Bul	llock, Mrs. Ims-		
	Direct Examination	II	882
2	Cross-Examination	II	883
Bu	rke, Howard P		0
	Direct Examination	II	884
	Cross-Examination	II	885
	Re-Direct Examination	*II	. 887
Bu	rkner, Earl K.—		
-	Direct Examination	II	731
	Cross-Examination		733
Car	valier, Mrs. Caroline-		
	Direct Examination	-1	612
	Cross-Examination		613
Ch	apman, Elwood B.—		
-	Direct Examination	f i	246
	Cross-Examination	ī	251
Cla	arke, Richard—		
Cia	Direct Examination	I	371
	Cross-Examination.	_	
Ca	hen, Jacob J.—		
-	Direct Examination	I	457
	Cross-Examination		458
	Re-Direct Examination		459
	Re-Cross-Examination		459
-			432
Co	iliflower, Mrs. Irma— Direct Examination	T	427
	Cross-Examination		428
	Re-Direct Examination		429
	Re-Cross-Examination		429
	AC-CIUSS"EAGHIHAHUH	4	767

0

	poll 1	Vol.	Page
Cooper, Walter Johnston-		* 1	
Direct Examination		. II	775
Cross-Examination			. 777
Re-Direct Examination		. 11	780
Re-Cross-Examination	***************************************	. 11	781
Cowles, Mrs. Florence L			
Direct Examination		. I	491
Cross-Examination		. I	492
Creedon, Miss Marie-			
Direct Examination		. І	363
Cross-Examination		. 1	364
Direct Manual A			
Direct Examination		. 1	397
Cross-Examination			397
	. 0		
Darling, Mrs. Grace— Direct Examination			393
Cross-Examination	,		394
Re-Direct Examination			395
Re-Cross-Examination			395
· · · · · · · · · · · · · · · · · · ·	************		030
Darling, Preston			395
Direct Examination		. I	395
Cross-Examination		. I	390
DeWeese, Tranan'A		*	
Direct Examination			558
Cross-Examination			574
Re-Direct Examination			596
Re-Cross-Examination			597
Re-Direct Examination			611
Re-Cross-Examination	***************	. I	611
Dingee, Henry L.—		. /	
Direct Examination		. 11	860
Cross-Examination		. II	862
Re-Direct Examination		. II	367
Re-Cross-Examination			. 868
Re-Direct Examination			871
Re-Cross-Examination		. II	871

DEDEX-Continued.

Re-Direct Examination	II	872
Re-Cross-Examination	-11	872
Re-Cross-Examination	11	872
Re-Direct Examination	11	872
Re-Cross-Examination	II	873
Re-Direct Examination		873
Re-Gross-Examination		
Dodge, Frederick A.—	1	529
Direct Examination	1	530
Cross-Examination	ī	531
Re-Direct Examination	i	531
Re-Cross-Examination	•	
Doyle, W. A.—	I	387
Direct Examination	î	389
Cross-Examination		. 507
Doyle, W. A	1	552
Direct Examination	. 1	554
Cross-Examination	I	555
Re-Direct Examination	_	556
Re-Cross-Examination	i	. 556
Re-Direct Examination		557
Re-Cross-Examination	I	557
Re-Direct Examination	-	557
Re-Cross-Examination	1	201
Duane, Howard-	ī	301
Direct Examination	I	302
Cross-Examination	I	302
Re-Direct Examination	I	302
Re-Cross-Examination		
Duniap, Charles E	0	674
Direct Examination	. I	675
Cross-Examination	. · I	679
Re-Direct Examination	. I	680
Re-Cross-Examination	. I	000
Factorian William G.		755
Direct Examination	. 11	756
Cross-Examination	. 11	han
Re-Direct Examination		759
Re-Cross-Examination	. II	139

Ellis, Arthur R.—	Vol.	Page
Direct Examination		
Cross-Examination	I	376
Re-Direct Examination	I	378
Re-Cross-Examination	·I	378
Re-Direct Examination	ľ	379
Re-Cross-Exercination	I	379
Evens, Mins Bess-	I	379
Direct Examination		
Cross Promings	1	647
Cross-Examination	I	649
Re-Direct Examination	I	650
Re-Cross-Examination Evans, Nora G.—	I	651
Direct Examination	1	651
Cross-Examination	I	653
Re-Direct Examination	·I,	655
Re-Cross-Examination	· I	655
Fagan, Allan H.—		
Direct Examination	I	634
Cross-Examination	I	635
Fatjo, Mrs. Jessie M.—		
Direct Examination	II	741
Cross-Examination	11	744
Feinberg, Benjamin-		
Direct Examination	1	373
Cross-Examination	1	375
Fenci, James A.—	•	373
Direct Examination	*	\$26
Cross-Examination	I	526
Re-Direct Framination	T	527
Fisher, William Perry		36/
Direct Examination		
Cross-Examination	I	462
Frazier, Harry W.—		463
Direct Francisco		
Cross-Examination	I	298
Cross-Examination	I.	299

(viii)

Gallahue, James—	VOL.	Page
Direct Examination	1	346
· Cross-Examination	I	347
Re-Direct Examination	1	348
Re-Cross-Examination	1	348
Golden, Mrs. Bess-		
Direct Examination	0-I	516
Cross-Examination	1	517
Goodman, Mrs. Clara-		
Direct Examination	1 -	429
Cross-Examination	I	430
Re-Direct Examination	1	431
Re-Cross-Examination	I	432
Gotwalt, George M.—		
Direct Examination	ī	523
Cross-Examination		524
Re-Direct Examination	I	. 525
Re-Cross-Examination	Io	525
Greene, Myrtle—	4	-
Direct Examination	1	489
Cross-Examination	I	490
	. 1	490
Guthrie, Lester S.— Direct Examination		
	II	936
Cross-Examination	II	938
Re-Direct Examination	II ·	941
Re-Cross-Examination	11	241
Hamilton, Robert H.—		
Direct Examination	I	353
	1	354
Re-Direct Examination	I	355
Re-Cross-Examination		355
Re-Direct Examination	Ι	357
Re-Cross-Examination	· I	358
Hannigan, William A.—		ton-
Direct Examination	I	295
Cross-Examination	I	296

	Vol.	Page
Harris, Mrs. C. Coe-	9 .	
Direct Examination	. I	481
Cross-Examination	. I	482
Herron, Mrs. Emily-	-	
Direct Examination	. 1	464
Cross-Examination	. 1	465
Holmer, Oscar Raymond-		
Direct Examination	. 1	503
Cross-Examination	L	504
Re-Direct Examination	I	506
Hunsaker, Mary-		
Direct Examination	II	906
Cross-Examination	II	907
Re-Direct Examination	II	916
Re-Cross-Examination	II	916
Hurd, William S.		1-190
Direct Examination	II	970
Cross-Examinations.	II	973
Johnson, Charles Edward—	- \	
Direct Examination	1	549
Cross-Examination	1	549
Jones, Elmer R.—	-	
Direct Examination	I	536.
Cross-Examination	ī	540
Re-Direct Examination	I	543
Re-Cross-Examination	I	543
Re-Direct Examination	1	544-
Re-Cross-Examination	I	544
Keedcr, Orville—		
Direct Examination	I	451
Cross-Examination	I	452
Keenan, Theodore-		
Direct Examination	1 .	452
Kenney, Thomas Roger—		
Direct Examination	I	390
Cross-Examination	i.T	390
		930

	Vol.	Page
Kershaw, James-		:
Direct Examination		382
Cross-Examination	1 -	383
Kirkland, Elbert—		
Direct Examination		768
Cross-Examination	II	770
Re-Direct Examination	II	773
Re-Cross-Examination	·II	774
Kleeman, Elmer J.—		
Direct Examination	I	527
Cross-Examination	I	529
Körsen, Mrs. Beatrice M		
Direct Examination	·I	513
Cross-Examination		513
Lansdowne, Mrs. Adeline-		01,0
Direct Examination	· 1	465
Cross-Examination	I	467
	b	407
Lee, Alvin J.— Direct Examination	**	080
	Ile	873
Cross-Examination	II	874
Re-Direct Examination	II	879
Re-Cross-Examination	II	880
Re-Direct Examination	II	881
Leighton, Fred-		
Direct Examination	I	474
Cross-Examination	I	476
Re-Direct Examination	I	477
Re-Cross-Examination	I	478
Leonard, Jesse A.—		
Direct Examination	I	352
Cross-Examination	I	352
Leonard, Samuel A.—		
Direct Examination	Ι.	639
* Cross-Examination	1	640
Re-Direct Examination	.I	640

Lierley, Clarence E.—	Vol.	Page	
Direct Examination			
Cross-Examination	. II	797	
Loughlin, Miss Evelyn-	. II	799	
Direct Examination			
Cross-Framination	. I	501	
Cross-Examination	. I	502	
Re-Cross-Examination Loughrey, Edward P.—	. I	502	
Direct Francisco			7
Direct Examination	. 1	417	
Cross-Examination	I	418	
Re-Direct Examination Ludwig, William Laird—	. I	419	*
Direct Francisco		*	
Direct Examination	· I	534	
Cross-Examination McCarthy, P. F.—	I	. 535	
Direct Examination	II	830	
Cross-Examination	II	832	
MacCool, Arnold-			
Direct Examination	II	738	
Cross-Examination	II	739	
Ac-Direct Examination	II	741	
MacLiume, Miss Adele—			
Direct Examination	II	786	
Cross-Examination	II	788	
account Examination	II	790	
Macking, Andrew B.—			
Direct Examination	1	493	
Cross-Examination	I	494	
Re-Direct Examination	I	493	-
Re-Cross-Examination	I	495	
MacKay, William E.—			
Direct Examination	I	681	
Cross-Examination	1	682	
Mahaffey, Mrs. W. A.—			
Direct Examination	II	888	
Cross-Examination	II	889	
	A.L	003	

Water Pisters 77	Vol.	Page
Malone, Richard H.— Direct Examination		
		958
Cross-Examination		961
Re-Direct Examination		967
Re-Cross-Examination	II.	968
McCabe, Mrs. Florida P.—	,	
Direct Examination	I	366
Cross-Examination	I	367
McClellan, Ephraim-		2
Direct Examination	I	484
Cross-Examination	· I	485
McCrum, John F. L.		
Direct Examination	I	655
Cross-Examination	I	656
Re-Direct Examination	1	657
McFarland, Mrs. Dorothy-		
Direct Examination	II ·	782
Cross-Examination	II °	784
McKinney, James T		
Direct Examination	1	630
Cross-Examination	I	631
McShane, William H.—		
Direct Examination	1.	443
Cross-Examination	1	444
Meggelin, John Fred-		
Direct Examination	1 *	507
Cross-Examination	1.	507
Melloure, Joseph C.—		
Direct Examination	I	485
Cross-Examination	ī	486
Michalak, Stanley A.—	3	
Direct Examination	ī	498
Cross-Examination	I	500
Re-Direct Examination	I	501
Miller, Carl—	•	
Direct Examination	I	461
Cross-Examination	- I	462
4		.00
· (xiii)		

Miller, Joe H.—	Vo	1.	Page
Direct Examination			
Cross-Examination		I	432
Re-Direct Examination	. (I	433
Moser, Mrs. Edith-		1	434
Direct Examination		4	
Cross-Examination	1]	424
Mund, Mrs. Ida-	. 1	I	424
Direct Examination	I		638
Cross-Examination	I		639
		8	
Direct Examination	II	2.	837
Cross-Examination	II		840
Re-Direct Examination Re-Cross-Examination	II	*	844
Re-Cross-Examination	II		845
Re-Direct Examination	II	1	848
Re-Cross-Examination	II		848
Direct Examination			
Nubermeyer, William Franklin—	I		632
Direct Examination			
Cross-Examination	I		453
Oakes, Earl T.—	1		454
Direct Examination			
Cross-Examination	I	*	259
Re-Direct Examination	I	0	277
Re-Cross-Examination	I		293
Oliva, George-	I		295
Direct Examination			
Cross-Examination	I		620
Re-Direct Examination	I		624
Re-Cross-Examination	I		626
Re-Direct Examination	I		626
Re-Cross-Examination	I	. 1	627
Oliva, George (Recalled)—	I		627
Pa Cassa Passain si	_	1	
Re-Direct Examination	I		557
Re-Cross-Examination	I		562
	I	(662

Orr, John A.—	Vol.	Page
Direct Examination	т	447
Cross-Examination		
Re-Direct Examination	r	448
Re-Cross-Examination		450
	redire A	430
Parnell, Jesse W.—		
Direct Examination		641
Cross-Examination		642
. Re-Direct Examination	I	642
Pender, Harry Edwin-		
Direct Examination	I	455
Cross-Examination	I	456
Re-Direct Examination		456
Re-Cross-Examination	I	457
Pialet, Frank J		
Direct Examination	I	440
Cross-Examination	I	441
Re-Direct' Examination	1	442
Re-Cross-Examination	I	442
Planz, Harry O.—		
Direct Examination	I	496
Cross-Examination		- 497
Re-Direct Examination	Y	497
Pyros, Nick-		
Direct Examination	I	479
Cross-Examination	I	479
Rachlin, Mrs. Ruth-		
Direct Examination	· · · · · · · · · · · · · · · · · · ·	514
Cross-Examination		515
		313
Reynolds, Maxine—		000
Direct Examination		902
Cross-Examination	II	902
Rickard, Henry Beeman-		
Direct , Examination		821
Cross-Examination	II	823
(xv)		1

	Vol.	Page
Re-Direct Examination	II	826
Re-Cross-Examination		827
Re-Direct Examination		828
Re-Cross-Examination	II	828
Re-Direct Examination	II	829
Re-Cross-Examination	II	829
Ristig, Caroline-		
Direct Examination	I	511
· Cross-Examination	. I.	512
Ritter, William Frank-		9
Direct Examination	I	- 516
Patter World W.	*	
Direct Examination	1	368
Robins, Lucien N.— Direct Examination	. 1	381
Cross-Examination	I	382
	**	
Rodda, Sidney W.— Direct Examination	. 11	805
Cross-Examination	II	808
Re-Direct Examination		819
Re-Cross-Examination	· II	, 820
		e
Rohn, Harry C.— Direct Examination	. 1	471
Cross-Examination	. 1	- 472
Re-Direct Examination	I	473
Re-Cross-Examination	. 1	473
Ruch, William C.— Direct Examination	. 11	801
Cross-Examination	. 11	803
Salbin, Nathan-	. 1	619
Direct Examination		- 4
Sanborn, Mrs. Gratia C.—	· T	358
Direct Examination	. I	360
Cross-Examination		

	Vol.	Page
Schapansky, George-	. 01.	Lage
Direct Examination	II	714
Cross-Examination		720
Re-Direct Examination		725
Schmidt, Louis Richard-		9
Direct Examination	. 1	532
Cross-Examination	ī	533
Schneider, Jacob F.—		
Direct Examination	I	467
Cross-Examination	1	469
Schloesser, Harry E		
Direct Examination	I	508
Cross-Examination	I	509
Re-Direct Examination	I	511
Re-Cross-Examination	ī	511
Re-Direct Examination	I	511
Schwarz, Fred A.—		
Direct Examination	I	550 ~
Cross-Examination	. 1	551
Re-Direct Examination	I.	551
Re-Cross-Examination	I	551
Re-Direct Examination	I	552
Sell. Fred—	- 1	332
Direct Examination		400
Cross-Examination	I	487
Re-Direct Examination	I . I	487
'Re-Cross-Examination	I	488
Re-Direct Examination	I	488
Shaffer, LeRoy—		400
Direct Examination	I	419
Cross-Examination	·ĭ	420
	1	420
Sharpley, Benjamin Harrison—		
Direct Examination	I	399
Cross-Examination	-1	400
Siebert, Paul W,		
Direct Examination	Ib	892
Cross-Examination	11	894

	Vol.	Page
Skewes, Laurence—		6
Direct Examination		520
Cross-Examination	. 1	520
Soost, Harry J.—		0 .
Direct Examination	1	412
Cross-Examination	1	41-3
Re-Direct Examination	· 1	414
Sowles, Donald J		
Direct Examination	II	726
Cross-Examination		728
Re-Direct Examination	II	730
Re-Cross-Examination	11	730
Re-Direct Examination	II.	730
Re-Cross-Examination	II	731
Stalcup, Mrs. R. K.—	/	
Direct Examination	11 .	903
Cross-Examination	II	904
Steen, Harry F	**	204
Direct Examination	**	
Cross-Examination	II	919
Re-Direct Examination	II	921
Re-Cross-Examination	II	930
Re-Direct Examination	II	930
Steneck, Henry W.—		930
Direct Examination		
Cross-Examination	1	628
Re-Direct Examination	I	629
Re-Cross-Examination	·F	630
	1	630
Stibeling, Mrs. Florence		
Direct Examination	1	470
Cross-Examination	1	471
Stimets, Chauncey A.—		*
Direct Examination	I	364
Cross-Examination		365
Re-Direct Examination	1 .	-365

THOMY Continued		
INDEX—Continued.	Vol.	Page
Sturns, Washington-	VOI.	1 age
Direct Examination	ii	968
Cross-Examination	ń	969
Sweet, Edward Evered-		
Direct Examination	I	325
Cross-Examination	-	334
Re-Direct Examination	,	343
Re-Cross-Examination		344
Re-Direct Examination		346
Sykes, Fred A.—		
Direct Examination	I	349
Cross-Examination		350
•		351
Re-Direct Examination		
Re-Cross-Examination		351
Re-Direct Examination	I	351
Textor, Henry J.—		
Direct Examination	1	523
Cross-Examination	I	523
Thayer, Ralph-		
Direct Examination	I	405
Cross-Examination	1	406
Re-Direct Examination	I	407
Thompson, E. N.—		
Direct Examination	I	435
Cross-Examination	. 1	435
Trescher, Margaret-		
Direct Examination	I	- 444
Cross-Examination		445
Re-Direct Examination	I	445
Treser, Edward-		
Direct Examination	I	426
Cross-Examination	ī	426
	*	120
Tuthill, C. Wayne—	I	643
Direct Examination		644
1 FORS - R Yamination	2	5,309.06

Tutt, Clara M.—	Vol.	Page
Direct Examination		
Cross-Examination	. II	900
Tuttle, Mrs. Leon E	. II	901
Direct Examination		
Cross-Examination	I	613
Cross-Examination Re-Direct Examination	I	614
Re-Cross-Examination	I	614
Tyler, Fred A-	I	615
Direct Examination		
Cross-Examination	II	931
Cross-Examination	11	931
Re-Direct Examination	II	934
Re-Cross-Examination Van Aradale, W. D.—	II	934
Direct Evernination		
Direct Examination	II	759
Cross-Examination	II	762
Re-Cross Framination	11	765
Re-Cross-Examination	II	766
Re-Direct Examination	11	767
Re-Cross-Examination	11	768
Re-Direct Examination	·II·	769
		*
Direct Examination	. I	402
Cross-Examination	I	-403
Re-Direct Examination	1.	403
Direct Examination	I	316
Cross-Examination	I	323
Direct Francisco	,	
Direct Examination	1	684
Cross-Examination	I	685 -
Re-Direct Examination	I	694
Re-Cross-Examination	I	694
Re-Direct Examination	. 1	696
Re-Cross-Examination	I .	697
Re-Cross-Examination	I	698
C. C	T .	600

	Vol.	Page
Warren, George H.—	1	
Direct Examination		517
Cross-Examination		518
Re-Direct Examination		519
Re-Gross-Examination	. I.	519
Washington, George R.—	-	1
Direct Examination	. I.	531
Cross-Examination	. I	532
Watkins, Paul R.—		
Direct Examination	. I	545
Cross-Examination	. I	545
Re-Direct Examination	. 1	547
Re-Cross-Examination	. 1	547
Re-Direct Examination	. I	548
Re-Cross-Examination		548
Waugh, R. L.—		
Direct Examination	. II .	848
Cross-Examination		851
Weinstock, Michael—		
Direct Examination	. 1	662
Cross-Examination		665
Re-Direct Examination		669
Re-Cross Examination		671
Re-Direct Examination		672
Re-Cross-Examination		672
Re-Direct Examination	(as	674
Westphal, Mrs. Clara—		
Direct Examination	. 1	492
,		496
Winte, acts. Jane Mess		100
Direct Examination	*	422
Cross-Examination	I	423
Wishnie, Joseph—	*3.	- or phone
Direct Examination		633
Cross-Examination		633
Re-Direct Examination	I	634
Re-Cross-Examination	I	634

Yorke, Harold O	Vol.	Page
Direct Examination		* 1
Cross-Examination	. I	483
Ziegmund, Ben-	. 1	483
Direct Examination	2 3	ů.
Cross-Examination	. 1	521
Zuegel Oscar William		521
Direct Examination		e .
Cross-Examination	. 1	522
	. 1	522
Adams, Ross T.—		
Direct Examination		
Cross-Examination	. 11	
Adams, Ross T. (Recalled)-	. 11	1167
Cross-Examination	:_	
Re-Direct Examination	11	1176
Re-Cross-Examination	п	1176
Re-Direct Examination	II	1179
Re-Cross-Examination		1179
Re-Direct Examination	11	1180
Alberts, Clarence E	II	1130
Direct Examination		1.
Cross-Examination	111	1527
Amann, Mrs. Elizabeth-	111	1528
Direct Examination	***	
Cross-Examination	111	1702
Ander, George E	111	1703
Direct Examination	***	
Cross-Examination	111	1631
Re-Direct Examination	111	1635
Re-Cross-Examination	TIL	1640
Re-Direct Examination	1112.	1643
Re-Cross-Examination	111	1644
Anderson, Barton V	111 .	1644
Direct Examination	**	0
Cross-Examination	II.	1318
Re-Direct Examination	II:	1319
	TI's	1321

	Vol.	Page
Re-Cross-Examination	II	1322
Re-Direct Examination	II	*1324
Re-Cross-Examination	II	1324
- Re-Direct Examination		1324
Anderson, Barton V. (Recalled)-		
Direct Examination	II	1339
Andre, Emmeran		
Direct Examination	Ш	1489
Cross-Examination		1490
Atkins, Jennings-		2
Direct Examination	III	1629
Cross-Examination		1630
Re-Direct Examination		1630
Re-Cross-Examination		° 1630
Barth, George F		
Direct Examination	II	1297
Cross-Examination		1298
Re-Direct Examination		1301
Re-Cross-Examination		1301
Roston Andrew Patrick-		
Direct Examination	IIÌ	1594
Cross-Examination	Ш	1595
Barrett, Mrs. Helen E		
Direct Examination	III	1968
Cross-Examination		1969
Re-Direct Examination		1970
Baskett, John William-		
Direct Examination	. II	1341
Cross-Examination		1343
Re-Direct Examination		1345
Benedict, Mrs. Marie—		
Direct Examination	III.	1450
Cross-Examination	. III	1451
Re-Direct Examination	III	1451

(xxiii)

-	Bergey, David H.—	Vol.	Page	
	Direct Examination	3		
	Cross-Examination	II	1363	
	De Direct Examination	11	1366	
	Re-Direct Examination	11.	1368	
	Re-Direct Examination	11	1368	
	Re-Cross-Examination		1372	
	Berry, Otis K.—	II	1372	
	Direct Examination			
		II	1094	
	Cross-Examination	II	1099	
	Re-Direct Examination Berry, Otis K. (Recalled)—	II	1103	
*				
	Direct Examination	II	1174	
	Cross-Examination	II	1175	
			2	
	Direct Examination	III	1974	
	Cross-Examination	III	1975	
	Direct Examination			*
	Cook Provided	III	1800	*
	Cross-Examination	III	1803	
	Re-Direct Examination	III	1805	
*	Blank, Raymond P.—			
	Direct Examination	III	1591	
	Cross-Examination	III	1592	
	Boardman, Eugene S,—			
	Direct Examination	III	1765	
	Cross-Examination	Ш	1766	
	Borders, Russell—	2 14	6	
	Direct Examination	III	1550	
	Cross-Examination	III .	1552	
	Re-Direct Examination	II	1554	V
	Boyer, Mrs. William D.—			
	Direct Examination	II .	1852	
	Cross-Examination	II -	1853	
	Braden, E. F.—		/	
	Direct Examination I	II	1491	
	Cross-Examination	II	1491	

V.	ol.	Page
Braunhardt, Charles Conrad-		1.
Direct Examination	III.	1492
Cross-Examination		1493
Re-Direct Examination	III	1495
Brown, Louis Wilson-	1	* 1.1 4
Direct Examination	11/	1289
Cross-Examination	II	1292
Re-Direct Examination	II	1296
Re-Cross-Examination	II	1297
Brown, Mrs. Marguerite Ly-		
Direct Examination	Ш	1470
Cross-Examination	III	1471
Re-Direct Examination	III	1472
Brun, Joseph B.—		*
Direct Examination	II (1203
Cross-Examination	II	1205
Re-Direct Examination	II	1207
Burger, Mrs. William-		
Direct Examination	III	1966
Cross-Examination		1966
Re-Direct Examination	III	1967
Burns, Mrs. Grace-		
Direct Examination	II	1036
Cross-Examination	II	1037
Re-Direct Examination	II	1038
Bush, Harold W.—		
	III	1544
Cross-Examination	III	1545
Re-Direct Examination		1547
Carr, Chester William-		**
Direct Examination	III	1467
Cross-Examination		1468
Re-Direct Examination		1469
Case, A. Leonard—	TIT	1940
Direct Examination	III	1941
	ALL	1241
(xxx)	1	5

Florian, Charles F.—	ol. Page
Direct Examination	
Cross-r-ramination	II 1309.
Re-Direct Examination	II 1310
Re-Cross-Examination	II 1311
Forg, Mrs. Elizabeth-	II 1312
	. 2
Direct Examination	
Fowler, Mrs. Bertha P.—	.1608
Direct F. amination	
Cross-Examation	-
Re-Direct Examination	1758
Fowler, Ralph C	I' 1759
Direct Examination II	
Cross-Examination II	
Fox, B. Blaine—	I 1711
Direct Examination	
Cross-Examination III	I 1691
Re-Direct Examination III	1 1693
Re-Cross-Examination III	1695
Re-Direct Examination III	1696
Frank, Julius D.—	1696
Direct Examination	
Cross-Examination III	1483
Re-Direct Examination III	. 1484
Frey Mrs Fleanor	
Direct Examination	
Cross-Examination	1602
Friedman, Sam I.	
Direct Examination	"
Cross-Examination III	1622
Re-Direct Examination III	1623
Gailup, Multon A.—	1624
Direct Examination III	
	1880
Examination	1883
Re-Cross-Examination III	
· · · · · · · · · · · · · · · · · · ·	1887

	Vol.	Page
Re-Direct Examination	III	1888
Re-Cross-Examination	III	1888
. Re-Direct Examination	III	1889
Gillogly, Mrs. Alice May-		
Direct Examination	III	1967
Cross-Examination	III	1968
Re-Direct Examination	III	1968
Glanding, Howard S		
Direct Examination	III	1828
Cross-Examination	III .	1830
Re-Direct Examination	III	1832
Gourwitz, Morris—		
Direct Examination	III	1454
Cross-Examination	III	1455
Re-Direct Examination	III	1457
Granger, Mrs. Miriam K		
Direct Examination	III	1659
Cross-Examination		1659
Re-Direct Examination	III	1660
Gray, William J.—		
Direct Examination	III	1529
Cross-Examination	III	1530
Re-Direct Examination	III	1531
Grimm, Mrs. Walter-		
Direct Examination	III	1785
Cross-Examination	III	1786
Grobel, Ewald-		, .
Direct Examination	III	1781
Cross-Examination	III -	1783
Gruber, Mrs. Ruth-		
Direct Examination	III	1601
Cross-Examination	III	1601
Guyer, Clifford F		
Direct Examination	III	1895
Cross-Examination		1896
Re-Direct Examination	III	1898
Re-Cross-Examination		1899
Re-Direct Examination		1899

(xxxi)

Ha	II, Frederick	· Vol.	Pag
	Direct Examination	***	101
			1814
	Cross-Examination	'111	1819
Har	Re-Direct Examination	III	.1821
Atel		,	
	Direct Examination	III	1392
	Cross-Examination	III	1393
TT	Re-Direct Examination	III	1395
rian	ey, Mrs. Catherine C.—		
	Direct Examination	III	1767
	Cross-Examination	III	1767
	Re-Direct Examination	III	1768
Har	vey, Aloysius—		
	Direct Examination	III	1669
	Cross-Examination		1670
	Re-Direct Examination	III	. 1672
Hati	field, Mrs. Grace—		
	Direct Examination		1444
	Cross-Examination	III	1445
	Re-Direct Examination	III	1445
Hear	m. Stanley B		
	Direct Examination	II	1132
	Cross-Examination	II	1135
Heln	aers, Harry J	2	
,	Direct Examination	III	1562
	Cross-Examination		1564
	Re-Direct Examination	III	1568
İ	Re-Cross-Examination	III	1569
Henl	ey, Mrs. John E.—		1307
-	Direct Examination'	TIT	1970
	Cross-Examination	TIT	1970
.)	Re-Direct Examination	III	1971
Holla	and, Mrs. W. L.—	. 111	19/1
19	Direct Examination	11	1346
1	Cross-Examination	11	
Hoin	37 7	0 11	1346
	Direct Examination		1210
	Cross-Examination	77	1218
	Re-Direct Examination	II	1219
÷		II	1219
	(varii)		

. INDEA—Condition.		
	Vol.	Page
Hopkins, John-	;	10/0
Direct Examination	111	1862
Cross Examination		1869
Re-Direct Examination	111	1880
Hosman, B. Fay-		
Direct Examination	111	1948
Cross-Examination	III	1950
Re-Direct Examination	III	1951
Hoy, Louis James—		
Direct Examination	III	1395
Cross-Examination		1396
Re-Direct Examination	III	1397
Re-Cross-Examination		1398
Re-Direct Examination	III	1398
Inman, Duncan Monroe—		
Direct Examination	11	1361
Cross-Examination	11	1363
James, Mrs. Betsey-		7
Direct Examination	III	1733
Cross-Examination	III	1733
Re ² Direct Examination	III	1734
Re-Cross-Examination	III	1734
Re-Direct Examination		1734
Johnson, Carl O.—		
Direct Examination	III	.1900
Cross-Examination	III	1901
	III	. 1902
Tandan Clarence I -		
Direct Examination	II	994
Cross-Examination	II	1025
Jordan, Clarence L. (Recalled)—		
Direct Examination	II	1136
Cross-Examination	II	1137
Kasbarian, David K		
Direct Examination	III	1704
Cross-Examination	III	1707 .
Re-Direct Examination	III	1709
Re-Cross-Examination	III	1709
Re-Direct Examination		1709
Re-Cross-Examination	III	1710
1		

	INDEX—Continued.		
Kau.	David D	Vol.	Page
May,			
	Direct Examination	III :	1750
	Cross-Examination	III	1753
	Re-Direct Examination	III	1756
	Re-Cross-Examination	III	1756
	Re-Direct Examination	III	. 1757
W.	Re-Cross-Examination	III	1757
Neen	e, Mrs. Mary E.—		
	Direct Examination	III	1787
	Cross-Examination	III	.1788
Keil,	Leo-		
	Direct Examination	IÈ	1389
	Cross-Examination	III	1390
	Re-Direct Examination	III	1392
Kello	gg, Will K.—		
4 4	Direct Examination	II .	1046
	Cross-Examination	II	1053
	Re-Direct Examination	II	1057
	Re-Cross-Examination	II	1059
Kelly,	Mrs. Beatrice		
	Direct. Examination	III	1765
	Cross-Examination	III	1765
Kelly,	Elmer S.—		
	Direct Examination	111	1438
	Cross-Fxamination	III	1442
	Re-Direct Examination	III	1444
King,	Alonzo M.—		
	Direct Examination	III	1625
	Cross-Examination	III .	1626
	Re-Direct Examination	III	1627
King,	Mrs. Norma A.—		
	Direct Examination	116	1735
	Cross Examination	III	1735
Kissin	ger, Mrs. Eva-		1, 22
, ,	Direct Examination	T.F.	1854
	Cross-Examination	11	1855
	Re-Direct Examination	II .	1855
	Re-Cross-Examination	11	1856
-	Re-Direct Examination	11	1856
- 1			1000

	Vol.	Page
Kline, William T		
Direct Examination	. *	- 1979
Cross-Examination	III	1980
Re-Direct Examination		1981
Re-Cross-Examination		1981
Re-Direct Examination	III	1981
Re-Cross-Examination	III	1982
Kolvoord, Clayton Louis-		
Direct Examination	III	1403
Cross-Examination	111	1407
Re-Direct Examination	III	1411
Re-Cross-Examination	III	1413
Re-Direct Examination	III	1414
Re-Cross-Examination . P	III ·	1414
Re-Direct Examination	III	1414
Re-Cross-Examination	III	1414
Re-Direct Examination	III	1416
Kolvoord, Clayton Louis (Recalled)-		
Re-Direct Examination	III	1448
Re-Cross-Examination	III	1449
Re-Direct Examination	III	1449
Kroemer, Joseph E		
Direct: Examination	III	.1916
Cross-Examination		1917
Krug, Mrs. A. E.—		
Direct Examination	. II	1215
Cross-Examination		1215
Re-Direct Examination		1216
Re-Cross-Examination		1216
Re-Direct Examination		1216
Kuhn, Mrs. Julia-		
Direct Examination	III	1597
Cross-Examination	111	1598
Re-Direct Examination		1599
Re-Cross-Examination		1599
Kuha Mes Luella-		
Direct Examination	III	1608
Cross-Examination	III	1609
Re-Direct Examination		1610

INDEX-Continued.

	Vol.	Dane
Landin, Oscar H.—	VOI.	Page
Direct Examination	111	1889
Cross-Examination	!!!	¥ 1892
Re-Direct Examination	III	1894
Re-Cross-Examination	III	1894
Laughlin, Thomas W.	54	1024
Direct Examination		1224
Cross-Examination	II	1226
Re-Direct Examination	II	1,228
LeBlanc, Mrs. Lillian S		1.260
Direct Examination	III	1936
Cross-Examination	III	1937
Re-Direct Examination	III	1938
Re-Cross-Examination	· III	1938
Lee, Mrs. Keith-		1930
Direct Examination	II	1253
Cross-Examination	II	1254
Re-Direct Examination	II	1255
Re-Cross Examination	11	1255
Letcher, Mrs. Anna—)		1400
Direct Examination	НІ	1466
Cross-Examination	DI	1467
Re-Direct Examination	111	1467
Lewis, Joseph T.—	1 1	1407
Direct Examination	111	1531
Cross-Examination	III	1538
Re-Direct Examination	III	1541
Re-Cross-Examination	III'	1543
Re-Direct Examination	Viii	1543
. Re-Cross-Examination	ना	1544
Lightstone, Louis-		1944
Direct Examination	111	1488
Cross-Examination	111	1489
Lippert, Raymond J		1105,
Direct Examination	III *	1583
Cross-Examination	III	1585
Lippert, Raymond J. (Continued)—		1000
Re-Direct Examination	III .	1586
Re-Cross-Examination	III	1586
Re-Direct Examination :	III	1586
		1300

INDEX—Continued.

		Vol.	Page
Love	rin, Roy S.—		
	Direct Examination	H	1379
	Cross-Examination	II	1382
	Re-Direct Examination		1385
- 7.	Re-Cross-Examination	II	1385
	Re-Direct Examination	11	1386
Lurio	e, John E.—		4.4
	Direct Examination	III	1462
	Cross-Examination	III	£1463
Mac	Millan, Mrs. Harold L		
**	Direct Examination	II	1208
	Cross-Examination	II	1209
	Re-Direct Examination	· II	1210
Mad	ison, Mrs. Christina S.—		
+	Direct Examination	II	1240
	Cross-Examination		1241
Mag	a, Joseph Francis		
	Direct Examination	III	₹1684
	Cross-Examination	III	1684
Mah	an, Frank W.—		
	Direct Examination	III	1472
, -	Cross-Examination	III	1474
	Re-Direct Examination		1478
	Re-Cross-Examination	III	1480
Mau	de, Mrs. Jennie-		
1	Direct Examination	Н	1216
- /	Cross-Examination	II	1217
1	Re-Direct Examination	: II	1217
Maz	man, Harry-		
	Direct Examination		1742
	Cross-Examination A	III	1746
	Re-Direct Examination	III	1748
	Re-Cross-Examination	III	1748
	Re-Direct Examination	III	1749
	Re-Cross-Examination	III	1749
	Re-Direct Examination	III	1750
Mcl	Dade, Mrs. Ruby—		
	Direct Examination	II	1351
	Cross-Examination	11	1352
	Re-Direct Examination	II	1353
	Re-Cross-Examination	II	1353

(xxxvii)

INDEX—Continued

Direct Examination		Vol.	Page
Cross-Examination			
Re-Direct Examination	Direct Examination	III	1596
Mears, Hobart W.— Direct Examination	Cross-Examination	III .	1597
Direct Examination	Re-Direct Examination	III	1597
Cross-Examination	Mears, Hobart W		
Re-Direct Examination	Direct Examination	II	1194
Re-Cross-Examination	Cross-Examination	II	1195
Re-Direct Examination	Re-Direct Examination	11	1197
Re-Cross-Examination			1197
Medlin, Cresson A.— Direct Examination III 1736 Cross-Examination III 1739 Re-Direct Examination III 1741 Re-Coss-Examination III 1741 Re-Coss-Examination III 1742 Re-Cross-Examination III 1742 Melman, Morris— Direct Examination III 1685 Cross-Examination III 1688 Meyers, Mrs. Juliet V.— Direct Examination III 1697 Cross-Examination III 1698 Re-Direct Examination III 1699 Miller, Burton A.— Direct Examination III 1503 Cross-Examination III 1505 Miller, Charles W.— Direct Examination III 1840 Cross-Examination III 1847 Miller, George — Direct Examination III 1451 Miller, George — Direct Examination III 1452 Re-Direct Examination III 1453 Miller, Mrs. Mary G.— Direct Examination III 1778 Cross-Examination III 1779 Cross-Examination III 1779	Re-Direct Examination	11	1198
Direct Examination	Re-Cross-Examination	II	1198
Cross-Examination	Medlin, Cresson A.—		
Re-Direct Examination	Direct Examination		1736
Re-Direct Examination	Cross-Examination	III	1739
Re-Cross-Examination III 1741 Re-Direct Examination III 1742 Melman, Morris— III 1685 Direct Examination III 1688 Meyers, Mrs. Juliet V.— III 1698 Direct Examination III 1699 Re-Direct Examination III 1699 Miller, Burton A.— III 1503 Cross-Examination III 1505 Miller, Charles W.— III 1840 Cross-Examination III 1844 Re-Direct Examination III 1847 Miller, George— III 1451 Direct Examination III 1452 Re-Direct Examination III 1453 Miller, Mrs. Mary G.— Direct Examination III 1778 Cross-Examination III 1779	Re-Direct Examination	III	1741
Re-Direct Examination III 1742 Re-Cross-Examination III 1742 Melman, Morris— Direct Examination III 1685 Cross-Examination III 1688 Meyers, Mrs. Juliet V.— Direct Examination III 1697 Cross-Examination III 1698 Re-Direct Examination III 1699 Miller, Burton A.— Direct Examination III 1503 Cross-Examination III 1505 Miller, Charles W.— Direct Examination III 1840 Cross-Examination III 1844 Re-Direct Examination III 1844 Re-Direct Examination III 1844 Miller, George— Direct Examination III 1845 Cross-Examination III 1451 Cross-Examination III 1453 Miller, Mrs. Mary G.— Direct Examination III 1778 Cross-Examination III 1778 Cross-Examination III 1778	Re-Cross-Examination	Ш	1741
Melman, Morris— Direct Examination III 1685 Cross-Examination III 1688 Meyers, Mrs. Juliet V.— III 1697 Direct Examination III 1698 Re-Direct Examination III 1699 Miller, Burton A.— III 1503 Cross-Examination III 1505 Miller, Charles W.— III 1840 Direct Examination III 1844 Re-Direct Examination III 1847 Miller, George— Direct Examination III 1451 Cross-Examination III 1452 Re-Direct Examination III 1453 Miller, Mrs. Mary G.— Direct Examination III 1778 Cross-Examination III 1779	Re-Direct Examination		1742
Melman, Morris— Direct Examination III 1685 Cross-Examination III 1688 Meyers, Mrs. Juliet V.— III 1697 Direct Examination III 1698 Re-Direct Examination III 1699 Miller, Burton A.— III 1503 Cross-Examination III 1505 Miller, Charles W.— III 1840 Direct Examination III 1844 Re-Direct Examination III 1847 Miller, George— Direct Examination III 1451 Cross-Examination III 1452 Re-Direct Examination III 1453 Miller, Mrs. Mary G.— Direct Examination III 1778 Cross-Examination III 1779	Re-Cross-Examination	III	1742
Cross-Examination	Melman, Morris-		
Cross-Examination	Direct Examination	III	1685
Meyers, Mrs. Juliet V.— Direct Examination III 1697 Cross-Examination III 1698 Re-Direct Examination III 1699 Miller, Burton A.— III 1503 Cross-Examination III 1505 Miller, Charles W.— III 1840 Cross-Examination III 1844 Re-Direct Examination III 1847 Miller, George— III 1451 Cross-Examination III 1452 Re-Direct Examination III 1453 Miller, Mrs. Mary G.— Direct Examination III 1778 Cross-Examination III 1779			1688
Direct Examination	Meyers, Mrs. Juliet V		
Cross-Examination III 1698 Re-Direct Examination III 1699 Miller, Burton A.— III 1503 Cross-Examination III 1505 Miller, Charles W.— III 1840 Cross-Examination III 1844 Re-Direct Examination III 1847 Miller, George— III 1845 Cross-Examination III 1451 Cross-Examination III 1453 Miller, Mrs. Mary G.— III 1778 Cross-Examination III 1779	Direct Examination	III	1697
Re-Direct Examination	Cross-Examination	III	1698
Miller, Burton A.— Direct Examination III 1503 Cross-Examination III 1505 Miller, Charles W.— III 1840 Cross-Examination III 1844 Re-Direct Examination III 1847 Miller, George— III 1845 Cross-Examination III 1451 Cross-Examination III 1453 Miller, Mrs. Mary G.— Direct Examination III 1778 Cross-Examination III 1779			1699
Cross-Examination III 1505 Miller, Charles W.— Direct Examination III 1840 Cross-Examination III 1844 Re-Direct Examination III 1847 Miller, George— Direct Examination III 1451 Cross-Examination III 1452 Re-Direct Examination III 1453 Miller, Mrs. Mary G.— Direct Examination III 1778 Cross-Examination III 1779	Miller, Burton A.—		
Miller, Charles W.— Direct Examination Cross-Examination Re-Direct Examination Direct Examination III 1840 III 1844 Re-Direct Examination Direct Examination III 1451 Cross-Examination III 1452 Re-Direct Examination Miller, Mrs. Mary G.— Direct Examination Direct Examination III 1778 Cross-Examination III 1779	· Direct Examination	III	1503
Miller, Charles W.— Direct Examination Cross-Examination Re-Direct Examination Direct Examination III 1840 III 1844 Re-Direct Examination Direct Examination III 1451 Cross-Examination III 1452 Re-Direct Examination Miller, Mrs. Mary G.— Direct Examination Direct Examination III 1778 Cross-Examination III 1779	Cross-Examination	III.	1505
Direct Examination	Miller, Charles W		
Re-Direct Examination 2. III 4847 Miller, George— Direct Examination III 1451 Cross-Examination III 1452 Re-Direct Examination III 1453 Miller, Mrs. Mary G.— Direct Examination III 1778 Cross-Examination III 1779	Direct Examination	III	1840
Re-Direct Examination 2. III 4847 Miller, George— Direct Examination III 1451 Cross-Examination III 1452 Re-Direct Examination III 1453 Miller, Mrs. Mary G.— Direct Examination III 1778 Cross-Examination III 1779	Cross-Examination	III	1844
Miller, George— III 1451 Cross-Examination III 1452 Re-Direct Examination III 1453 Miller, Mrs. Mary G.— III 1778 Cross-Examination III 1779	Re-Direct Examination	H	1847
Cross-Examination III al452 Re-Direct Examination III l453 Miller, Mrs. Mary G.— III l778 Cross-Examination III l779	Willes Comme		B .
Cross-Examination III al452 Re-Direct Examination III l453 Miller, Mrs. Mary G.— III l778 Cross-Examination III l779	Direct Examination	EI'	1451
Re-Direct Examination III 1453 Miller, Mrs. Mary G.— Direct Examination III 1778 Cross-Examination III 1779			
Miller, Mrs. Mary G.— Direct Examination III 1778 Cross-Examination III 1779	Re-Direct Examination	III	
Cross-Examination III 1779	Miller, Mrs. Mary G.—		
Cross-Examination III 1779	Direct Examination	III	1778
De Dieset Exemination	Cross-Examination	ы	1779
Re-Direct Examination	Re-Direct Examination	III	1780

(xxxviii)

INDEX-Continued.

INDEA COMME		Vol.	Page
Molitor, Joseph L			
Molitor, Joseph L— Direct Examination		III	1486
Cross-Examination		III	1487
Re-Direct Examination		III	1488
Morrison, Thomas J			
Direct Examination	*****	III	1833
Cross-Examination	*****	III	1833
Re-Direct Examination		III	1834
Re-Cross-Examination		III	1834
Morrison, Clarence A			
Direct Examination		111	1835
Cross-Examination		III	1838
Re-Direct Examination		III	1839
Re-Cross-Examination		III	1839
Moses, Robert H			
Direct Examination		III	1547
. Cross-Examination		III	1549
Re-Direct Examination		III	1549
Moyer, George W			
Direct Examination		III	1848
Cross-Examination		III.	1850
Re-Direct Examination		III.	-1851
Muelier, Henry—		.*	
Direct Examination		III .	1579
Cross-Examination		. III	1581
Muntz, Harold F			
Direct Examination		. 11	1039
Muntz, Harold F. (Recalled)—			
Direct Examination		II	1059
Cross-Examination		. II	.1075
Re-Direct Examination			1086
Muntz, Harold F. (Recalled)—			
Direct Examination		. II	1088
Re-Cross-Examination			1091
Re-Direct Examination			1093
Mustz, Harold F. (Recalled)—	-		
Direct Examination		. II	1170
Cross-Examination		. H	1172
Cros-Examination	-		

(xxxix)

INDEX-Continued.

	Vol.	Page
Re-Direct Examination	III	104
Re-Cross-Examination	TII	1943
Re-Direct Examination	. III	1943
Chapelle, Clyde E_		
Direct Examination	TIT	1416
Cross-Examination	III	1420
Re-Direct Examination	TIT	1424
Re-Cross-Examination	TII	1425
Re-Direct Examination	TIT	1425
Re-Cross-Examination	111	1425
Re-Direct Examination	Ш	1426
Chew, Mrs. Edgar F		1720
Direct Examination	***	1001
Cross-Fyamination		1806
Re-Direct Examination		1806
Re-Cross-Examination	111	1807
Re-Direct Examination	111	
Childress, Miss Gladve—	111	1807
District Dis	*	
Ct. 1 30 v.m.	. 11 .	1288
Direct Examination		
Cross-Examination	III	1808
Re-Direct Examination	III	1808
Clotworthy, Mrs. W.—	III	1809
Direct Examination	III	1699
Cohen, Isadore—	III	1700
Direct Examination	III .	1859
Cross-Examination	III	1861
Cohen, Joseph G.—		
Direct Examination	II	1199
Cross-Examination	II.	1200
Re-Direct Examination	II	1201
Re-Cross-Examination	11	1202

(xxvi)

INDEX-Continued

0

	Vol.	Page
Conant, Mrs. Marian F		
Direct Examination	III	1426
Cross-Examination		1427
Re-Direct Examination	III	1429
Condon, Miss Marietta—		
Direct Examination	II	1286
Condon, Miss Marietta— Direct Examination Cross-Examination	H	1287
Connelly, Mark B.—		Ŧ
Direct Examination	II	- 1236
. Cross-Examination	II	1238
Copeland, Paul-		
Direct Examination	III	1983
Coins Examination	III	1986
D. Direct Framination	III	1989
Re-Cross-Examination	III	1989
Re-Direct Examination	111	1990
Re-Cross-Examination	III	1990
Craft, Alfred B.—		
Direct Examination	III	1770
Cross-Examination	III	1772
Re-Direct-Examination	III	. 1774
Carlotte Course W		
Direct Examination	II	1302
Cross-Examination	II	1303
Re-Direct Examination	II	1306
Re-Cross-Examination	H	1307
Re-Direct Examination	II	1307
Re-Cross-Examination	II	1308
Re-Direct Examination	.II.	1308
Crew, Austin D.—		
Direct Examination	III	1977
Cross-Examination		1978
Dedrich, Mrs.: Maud-		4 .
Direct' Examination	Ш	1607
Cross-Examination	III	7 1607

INDEX-Continued

Delass, Edward-		Vol.	Page
Cres Experience .	÷	III	1971
Re-Direct Francisco	***************************************	III	1973
DeMalie, John A.		III	1974
		III	1522
Con Francisco		III _	1523
Denison, Charles E.—			
Direct Francischer		III	1496
L'and L'amination 5		777	1498
	OIL	***	1500
The state of the s		***	1501
The second second	MD	III	1501
	***************************************		1501
Re-Open Francisco	0	III	1503
		III	1503
DeWolf, Abrem P			1303
Direct Exemples		777	1515
Control of the last of the las			
Re-Dunci Francisco		. 111	1517 .
The second secon		***	1519
Re-Dree Femilia		. 111	1519
Re-Cross-Francisco		. 111	1520
Re-Direct Francisco		111	1520
Deb. Nebole		111	1521
Direct Exemples			
Cross-Excessions			1574
Dietrich, Donald C-	4	III	1576
Direct Examination	,		
Cross-Experience		III .	1677
		III /	1679
Drenning, George William	٥	^	_
Direct Employee		III 1	1660
Con-Emmander		III 1	662
Re-Direct Francisco		III 1	663
Re-Cross-Francisco		III 1	663
100		III 1	664
Account to			664
14 to the same			664
		2.1	7

INDEX—Continued.		
	Vol.	Page
Dubac, Carl-	1.	
Direct Examination	II	1231
Cross-Examination	II	1233
Re-Direct Examination		1235
Dubois, James H.—		
Direct Examination	III	1945
Cross-Examination .4		1946
Re-Direct Examination	III	1948
Re-Cross-Examination		1948
Re-Direct Examination		1948
Dummer, Mrs. O. W.—		
Direct Examination	III	1429
Cross-Examination	III	1430
Re-Direct Examination	III.	1432
Re-Cross-Examination	III	1432
Re-Direct Examination	III	1433
Re-Cross-Examination	III	1433
Re-Direct Examination	III	1433
Re-Cross-Examination	III	. 1433
. Re-Direct Examination	III	14/33
Re-Cross-Examination	III	1434
Re-Direct Examination	III	1434
Ehrman, John J.—		
Direct Examination	III	1628 .
Cross-Examination		1628
Re-Direct Examination	III	1629
Farber, Harry	-	
Direct Examination	III	1689
Cross-Examination	III	1690
Re-Direct Examination	III	1691
Fierstine, Harry—		
Direct Examination	11	1256
Cross-Examination		1257
Re-Direct Examination	II	1259
Fishkin, Maurice—		
Direct Examination	III	1434
Cross-Examination		1435
Re-Direct Examination		1437
		0

(xxix)

INDEX-Continued.

		. Vol.	Page
Sha	w, William W.—	,	
	Direct Examination		1812
	Cross-Examination	III	1813
Sho	llenberger, Mrs. F. M.—		
	Direct Examination		1809
	Cross-Examination		1811
	Re-Direct Examination	III	1811
Smi	th, Robert J.—	-	
0	Direct Examination	III	1856
	Cross-Examination	іш	1858
	Re-Direct Examination	III	1859
Sny	der, Harry L	*	,
		III	1649 -
	Direct Examination	III	1650
Son	ntag, Mrs. B.—	*	*
	Direct Examination	II	1349
	Cross-Examination	II	1349
	Re-Direct Examination		1350
	Re-Cross-Examination		1350
	Re-Direct Examination		1351
Spra	att, Mrs. Lorett-		
	Direct Examination	III	1703
	Cross-Examination		1704
Stei	ner, Mrs. Blanche—	gp. 111	
	Direct Examination	II	1246
	Cross-Examination		1247
	Re-Direct Examination	II	1247
Stic	kney, Mrs. Martha A		124/
	Direct Examination	TTT	1928
	Cross-Examination	777	1928
	Re-Direct Examination	: III	1930
Stal	es, Mrs. William C.—		1930
	Direct Examination	***	1704
	Cross-Examination	111	1784 1784
Cton	hens, William M.—	HII	1/84
Step	Direct Exemination		1610
	Direct Examination	111	1618
	Closs-Examination	III	.1619

10

	INDEX—Continued.	-	
		Vol.	Page
	Re-Direct Examination	III	1821
10	D. Coose-Evamination	LAL	1622
	Re-Direct, Examination	III	1622
cms :	17 . dans .	*	4.
Thie	Disease Promination	III	1571
-	Core Exemination	111	1571
	D. Dieset Evamination	111	1572
	D. Come Elemination	EAR	1572
	D. Dieset Evamination	AAA	1573
	- C Finsting	AAA	1573
	D. Dieset Evamination		1574
	Re-Cross-Examination	III	1574
1.	mpson, Charles L.—		
Tho	Direct Examination	III	1944
	Cross-Examination	: III	1944
	Re-Direct Examination	III	1945
	and the state of t	4 1	* .
The	ompson, Lee W.—	II	1274
	Cross Examination	iI	1279
	Re-Direct Examination	II	1284-
	Re-Cross-Examination Re-Cross-Examination	II	1286
	Re-Direct Examination	II	1286
	Re-Cross-Examination	II	1286
	0		
Tie	deman, Mrs. Dorothy-	III	1469
	Direct Examination	III	1469
	Cross-Examination Re-Direct Examination	III	1470
À			
Tie	edemann, John—	11	1228
	Direct Examination	II	1229
	Cross-Examination	II	1231
ma	Re-Direct Examination		
To	msko, Albert T.— Direct Examination	117	A 1672
	Direct Examination	III	1674
	Cross-Examination		
T	senhy John E.—	III	
	Direct Examination '	111	177

(xlv)

Cross-Examination

INDEX-Continued

Tousignent, Mrs. Josephine-	Vol.	Page
Direct Examination	. VIT	1020
Cross-Examination	2 777	1938
Re-Direct Examination		1939
Trost, Joseph-		1939
Direct Examination		*
Cross-Examination	III	1923
Re-Direct Examination	III	
Trunick, Clifford B	, III	1925
Direct- Examination		
Cross-Examination	III	1653
Re-Direct Examination	III	1655
Re-Cross-Framination	III	1657
Re-Cross-Examination Twentyman, Arthur J.—	III	1657
Direct Examination		
Cross-Evamination		1507
Cross-Examination	III	.1509
Re-Direct Examination	III	1511
Re-Cross-Examination	III	1513
Re-Direct Examination	III	1513
Re-Cross-Examination	III	1514
Re-Direct Examination	III	1514
Re-Cross-Examination	III	1515
Tyler, Mrs. Margaret-	\$3	,
Direct Examination	III	1445
C. Obs-Lamination	TTT	1446
Re-Direct Examination	III	1447
vaugnn, Mrs. Margaret-	4	
Direct Examination	III	1700
Cross-Examination	III	1701
von Husen, Charles—		4
Direct Examination	II	1220
Cross-Examination	**	1222
Re-Direct Examination	II	1223
wagner, Gilbert G.—		1223
Direct Examination	II	1180
Cross-Examination	* **	
Re-Direct Examination		1182
Waldinger, Fred I —		1182
Direct Examination	111	1600
Cross-Examination	777	1680
	· · · · · · · III	1682

INDEX-Continued.

	Vol.	Page
Walters, Mrs. Leah-		
Direct Examination	III	1401
Cross-Examination	III	1402
Re-Direct Examination	III	1403
Walter, Mrs. Vera-		
Direct Examination	III	1604
Cross-Examination	III	1604
Waugh Mrs Helen E		
Direct Examination		. 1481
Cross-Examination	III	1481
Maritimen D		
Direct Examination	III	1644
Cross-Examination	III	1647
West, Stanley M.—		
Direct Examination	II	1183
Cross-Examination	II	1190
Re-Direct Examination	II	. 1194
Wescott, Mrs. William T		
Direct Examination	III	1780
Cross-Examination	III	1780
White Mrs Ada		
Direct Examination	III	1696
Cross-Examination	ИД	1697
Whitfield Pohert_		
Direct Examination	II	
Cross-Examination ·	Н	
Re-Direct Examination	II	1376
Wiers, Mfs. Minnie-		
Direct Examination	III	1926 .
Cross-Examination	III	1927
Re-Direct Examination	III	1927
Wilde, Adolph H		
Direct Examination	II	1325
Cross-Examination	11	
Re-Direct Examination	II	
Re-Cross-Examination	II)
Re-Direct Examination	II	
Re-Cross-Examination	II	1338
(-1-4:)		

	THOEN-CO	ontinued.			
Wilkes, Mrs. Eleanor Agr	nes		· v	ol. Pa	ag
Direct Examination					
Cross-Examination Re-Direct Examination	***********	*******	I	II 17	76
Re-Direct Examinat	ion	********	I	II. 17	69
Re-Direct Examinati Williams, Mrs. Beulah E	_	********	I	II 17	70
Direct Examination					
Cross-Examination .		*********	II	I 13	99
					00
Direct Examination					
Cross-Examination			II	I 192	22
Cross-Examination . Re-Direct Examination	***********	******	II	I - 192	23
Re-Direct Examination Williams, H. G.—	м	*******	II	I 192	23
			4	R	
Direct Examination			II	135	9
					-
- Landing and	П				-
					-
Re-Direct Examination Wilson, Alexander—	n		II		
- ricatinici-		*			
Direct Examination			III	1387	,
				1387	
Re-Direct Examination Re-Cross-Examination	*********		III	1.388	
	**********	********	III		
Witherell, Percy W.					
Direct Examination			III	1759	
Cross-Examination	*	1.		1763	
TOOL TOTAL T			III	1764	
Worrall, George				1704	
Direct Examination Cross-Examination			TTT	****	
	**********		III	1664	
7,000				1666	
Direct Examination .	******		***		
				1789	
Re-Cross-Examination			111	• 1792	
Re-Cross-Examination Re-Direct Examination		P	111	1796	
Re-Direct Examination			III	1796	
				1796	
				1797	
Re-Cross-Examination	*************	********	III	1797	
			III	1798	
	(xlviii)				

INDEX-Continued

Vol.	Page
Re-Direct Examination III	. 1798
Re-Cross-Examination III	1798
Re-Direct Examination III	1799
Re-Cross-Examination III	1799
Re-Direct Examination III	1799
Young, Mrs. Harriett	-
Direct Examination III	1465
Cross-Examination III	1465
Re-Direct Examination	1466
PLAINTIFF'S WITNESSES IN REBUTTAL.	
0 4 P 4 P 4 P 4 P	
Oakes, Earl T. (Recalled)— Direct Examination	2021
Cross-Examination	2025
Re-Direct Examination III	2032
	2002
Webster, Earl P.— Direct Examination	2012
Cross-Examination	-2013
Re-Direct Examination	2015
Re-Cross-Examination III	2017 2017
Re-Cross-Examination	2017
DEFENDANT'S WITNESSES IN SUR-REBUTTAL.	
Adams, Ross T. (Recalled)—	*,
Direct Examination III -	2033
Cross-Examination III	2035
Penty, William P. (Recalled)-	9
Direct Examination III	2037
Cross-Examination III	2038
Re-Direct Examination III	2040
Poole, Richard S. (Recalled)-	
Direct Examination III	2036
Cross-Examination III	2037
Reference to Argument in Circuit Court of Appeals III	2067
Opinion III	2069
Order Affirming Decree III	2073
Stipulation Regarding Vol. V of Record for Supreme Court III	2074
Clerk's Certificate, Volumes I, II and III III	2076
Clerk's Certificate, Volume IV, Exhibit Book IV	209
Clerk's Certificate, Volume V (Defendant's Patent Exhibits) V	517

INDEX TO EXHIBITS.

Ex.	Adn	nitted	Pri	inted
No.		Page		Page-
1-Carton of Shredded Wheat, Witness Wal-			1011	2 1000
lace		246		
2-Book Containing Samples of Cartons, Wit-			* 0,0	
ness DeWeese	1	574	Note	rinted
Book Containing Sample of Cartons, Wit-				/ meca
ness DeWeese	Ţ.	574	Note	rinted
4-Book Containing Sample of Cartons, Wit-	-/4		Not p	, inted
ness DeWeese	I	574	Note	rinted
5-Kellogg Package, Waitress 172/8/11/32,			240t p	inted
Biltmore Hotel, Providence, Witness				
Sweet	1	326		
6-Restaurant Check, Paid September 2, 1932,		000		
Biltmore Grill Room, Providence, Wit-				
ness Sweet	I	327	Not p	rinted
, 7-Kellogg Package, Delivered September 2,				
1932, Biltmore Hotel, Providence, Wit-			* 1	
ness Sweet	1	327		
8-Menu, September 2, 1932, Providence, Bilt-			1000	
more Hotel, Witness Sweet	1	327	Not p	rinted
9-Kellogg Carton, Served, Biltmore Hotel,				
Providence, September 1, 1932, Witness				•
Sweet	1.	328	IV	1
10-Old Style Carton, Shredded Wheat, Wit-	,	*.		•
ness Schapansky (Saucer With Two				
Biscuit)	.11	720*	IV	3
11-Kellogg Package, Grocery, Hamilton,				
Mass., Witness Sanborn	I	359*	IV	7
12-Kellogg Carton, Hawthorne Hotel, Salem,		4		
Mass., Witness Barrett	I	361*		***

^{*}Formal offer and admission of exhibit in evidence deleted in condensing record. · (1)

PLAINTIFF'S EXHIBITS—Continued.

Ex.		Adm	itted	Printed
No.		Vol.	Page	Vol. Page
13-	-Menu, Hawthorne Hotel, Salem, Mass.,			
	Witness Barrett	. I-	361*	Not printed
14				
	Witness Creedon		364*	
15-	-Kellogg Carton, Grocery, Castle Hill, Sa-			
	lem, Witness McCabe		366*	
16-	-Kellogg Package, Biltmore Hotel, Provi-			
	dence, Witness Doyle		388*	,
17-	-Menu, Biltmore Hotel, Providence, Wit-			
	ness Doyle		388	Not printed
18-	-Large Kellogg Carton or Case, Burlington			
	Grocery, Burlington (Photograph to Be		ě	
*	Substituted), Witness Sharpley	I	400*	
19-	-Individual Kellogg Carton, Vermont		. ,	
	Lunch, Burlington, Witness Thayer		406*	
. 20-	-Menu, Montpeller Tavern, Burlington, Vt.,		*	
	Witness Bradbury		408*	Not printed
21-	-Individual Box Shredded Wheat With Kel-			
	logg's Whole Wheat Biscuit Therein,			
1	Dorn's Cafe, Burlington, Vt., Witness			
0,	Bradbury	1	409*	/ "
22-	-Menu, Vermont Lunch, Burlington, Vt.,	2		(
	Witness Bradbury		409*	Not printed
23-	-Sales Slip, Duritsky's, Uniontown, Pa.,			
	Witness White	I	423	Not printed
24	-Kellogg Carton, Duritsky's, Uniontown,			
	Pa., Witness White	1	423	
25	-Sales Slip, H. L. Black Grocery, Juniata,			
	Pa., Witness Colliflower	. 1	427	Not printed
26	-Kellogg Carton, H. L. Black Grocery,			
	Juniata, Pa., Witness Colliflower	I	427	*** ***
27-	-Sales Slip, Huber's Grocery, Aitoona, Pa.,			
é	Witness Coodman		430	Not printed

^{*}Formal offer and admission of exhibit in evidence deleted in condensing record.

PLAINTIFF'S EXHIBITS-Continued.

Ex.	Adı	mitted	Printed
No.			Vol. Page
28-Kellogg Carton, Huber's Grocery, Altoona,			
· Pa., Witness Goodman		430	
29-Sales Slip, Witherow Store, Altoona, Pa.,			
Witness Miller		433	Not printed
30-Kellogg Carton, Witherow Store, Altoona,		4	
Pa., Witness Miller		433	
31-Kellogg Carton, Isaly's Daisy, Steubenville,			
Ohio, Witness Trescher		445	
32-Kellogg Carton, Restaurant, East Liberty,			
Witness Borneman	1	446	4
33-Kellogg Box With Paper Attached, Isaly's			
Dairy, 'Steubenville, Ohio, Witness		*	
Keeder		451	7.
34-Kellogg Carton, Kresge's, Steubenville,			****
Ohio, Witness Keenan	. I	452	
35-Strip Display Sign, Showing Dish Con-	7		
taining Two Biscuit, Witness Nuber-	4.4		
meyer	I	454	Not printed
36-Glass Bowl, Witness Nubermeyer	-1	454	rick printed
37-Kellogg Carton, Restaurant, Cleveland,	-		
Ohio, Witness Fisher	1	463	
38-A-Order Slip, Hammer Grocery, Cleveland,	-	100	
Witness Herron	ľ	464	Not printed
33-B-Kellogg Box, Hammer Grocery, Cleve-	. 5		
land, Witness Herron	-	.464	
39-A-Yellow Slip, Norris Grocery, E. Cleve-	-		*** ***
land, Witness Lansdowne	I	466.	Not printed
39-R-Kellogg Carton, Norris Grocery, E.			arot printed
Cleveland, Witness Lansdowne	ī	466	
40-A-White Slip, Grocery, Lakeview Road,		,	
Cleveland, Witness Lansdowne	I	467	Not printed
40-B-Kellogg Box, Grocery, Lakeview Road,			. Printed
Cleveland, Witness Lansdowne	I	467	
41-A-Yellow Sales Slip, Bob's Grocery, Cleve-			
land, Witness Schneider	I	469	Not printed

PLAINTIFF'S EXHIBITS-Continued.

Ex.		itted	Prin	
No.	Vol.	Page	Vol.	Page
41-B Kellogg Carton, Bob's Grocery, Cleve-				,
land, Witness Schneider	I	469		* * *
42-A-Sales Slip, "Y" Grocery, Cleveland,	6,	1		
Witness Stibeling	I'	470	Not p	rinted .
42-B-Kellogg Carton, "Y" Grocery, Cleveland,				
Witness Stibeling	1.	471		
43-Carton, Kellogg's, Huff Restaurant, Cleve-				
land, Witness Rohn	I	472		
44-Kellogg Carton, Grocery Store, Detroit,				
Witness Bernard	I	481 -	***	
45-Kellogg Carton, Cafe, Flint, Mich., Wit-				
ness Harris	1	482	***	
46-Kellogg Carton, Grocery Store, Detroit,		,		,
Witness Yorke	I	483		
. 47-Kellogg Carton, Grocery Store; Flint,				
Mich., Witness McClellan		485		
48-Kellogg Carton, Grocery Store, Flint,				
Mich., Witness Melloure		486		
49-Kellogg Carton Victory Lunch, Detroit		490	* ***	
50-A-Brown Paper Bag, Grocery Store, De-				
troit, Witness Cowles	, I.	492		
50-B-Kellogg " Carton, Grocery Store, De-			*	
troit, Witness Cowles	1	492		***
51-Kellogg 'Carton, Grocery Store, De-				0
troit, Witness Westphal	. 1	493		
52-G. & H. McMillan's Catalog, Detroit, Wit-				*
ness MacElroy	. I	494	Not	printed
53-A-Slip, Menu Card, Restaurant, Chicago,				
Witness Michalak	. I	499	Not	printed
53-B-Kellogg Carton, Restaurant, Chicago,		-		
Witness Michalak	I	499		* * *
SA-Kellogg Caron, YMCA, Chicago, Witness				
Loughlin	I	502		
55-A-Card, on Counter, Restaurant, Chicago	5"			
Witness Holmer	I	504	Not	printed
.).	,			

INDEX-Continued.

		87 4	-
No	rth, Alva F _o —	Vol.	Page
	Direct Examination	Ш	1524
	Cross-Examination	111-	1526
No	vak, Edward A.—	***	: 1320
	Direct Examination	II	1376
	Cross-Examination	TI	1378
	Re-Direct Examination	II	1378
*	Re-Cross-Examination	II	
Ols			1379
	Direct Examination	***	*
	Cross-Examination	1111	1913
Ow	ens, Mrs. Sarah—	111	1915
	Direct Examination		
	Cross-Examination	111	1612
2	Re-Direct Examination	111	1613
	Re-Cross-Examination	III	1613
	Re-Direct Framination	III	1614
	Re-Direct Examination	III	1614
	Re-Direct Examination	III	1614
Pah	Re-Direct Examination	III	1614
	Direct Examination		
	Come Promisely	III	1610
Dani	Cross-Examination	111	1611
I em	ty, William P.—	,	
	Direct Examination	II ·	1103
	Cross-Examination	II	1125
	Re-Direct Examination	II .	1130
D .	Re-Cross-Examination	II	1131
Perl	itz, Robert H.—		
	Direct Examination	II	1312
	Cross Examination	II .	1315
	Re-Direct Examination	II	1317
Pete	rson, Clarence Paul	*	
	Direct Examination c	Ш	1554
	Cross-Examination	TIT	1558
	Re-Direct Examination	III	1559
	Re-Cross-Examination	III	1560
Poco	ck, Mrs. Mabel N.—		1500
	Direct Examination	. 111	1482
	Cross-Examination	0.9	1483
	Re-Direct Examination	1	1483
		- 4	1 763.3

INDEX-Continued.

	Vol	Page
Poole, Richard S.—		
Direct Examination	II	1138
Cross-Examination	IL	1144
Re-Direct Examination	H	1147
Re-Cross-Examination	H	1148
Powell, Russell A.—	-	
Direct Examination	II	J263
Cross-Examination	· II	1267
Re-Direct Examination	II	1269
Reis, Nat C.—		
Direct Examination	III	1515
Cross-Examination		1616
Re-Direct Examination		1617
Re-Cross-Examination		1618
Re-Direct Examination	III	1618
Rice, Phillip Ray-		
Direct Examination	II	1248
Cross-Examination	II	1249
Re-Direct Examination	II	1252
Re-Cross-Examination *	II.	1252
Rifkin, Maurice J.—		
Direct Examination '		1259
Cross-Examination	11	1261
Re-Direct Examination	II	1262
Re-Cross-Examination		1262
Re-Direct Examination	H	1263
· Re-Cross-Examination	-II	1263
Re-Direct Examination	II	1263
Robbins, Fred F.—		
Direct Examination	11	1242
Cross-Examination	II	1243
Re-Direct Examination	. 11	1245
Re-Cross-Examination	II	1245
Roselle, George F.—	- =	
Direct Examination	. II	1353
Cross-Examination		1354
Re-Direct Examination		. 1357
Re-Cross-Examination	II	1358

INDEX Continued

Rose, Andrew	ol. Pag
	100
Cross-Experience	II 100
	**
The state of the s	TT
- The state of the	TT
To Control I	II 2012
Re-Description	II 2012
Period A-	II 2012
- Description	
C-F	II 1903
Property on II	II 1909
Parkers Corner A. (Recalled)-	1912
II III	
In Contraction III	I 1940
A DOMESTIC LINES OF THE PARTY O	I 1940
Direct Francisco	
II II	I 1457
Particular II	I 1458
Parties III	I 1460
Redien Exemption III	I 1461
III.	1461
Pa-Direct Francisco	1461
Re-Direct Exemination	1461
Die Frank III	1712
III	1722
Be Dec Francisco III	1728
B-G-F	1729
III	1729
III III	1729
III III	1729
Be Constitution III	1731
Parties III	1731
III	1605
III	1606
De Berlin	1953
III	1961

INDEX—Continued.

	Vol.	Page
Re-Direct Examination	III	1964
Re-Cross-Examination	III	1964
Re-Direct Examination	III	1965
Schmidt, L. P.—		
Direct Examination	II	1210
Cross-Examination	11.	1212
Re-Direct Examination	II	1213
Re-Cross-Examination	II	1213-
Re-Direct Examination		1214
Re-Cross-Examination		1214
Re-Direct Examination	II,	1214
Schoch, Paul G		
Direct Examination	III	1930
Cross-Examination	III .	1932
Schultz, Mrs. Etta M.—		
Direct Examination	III	1935
Cross-Examination	III :	1935
Re-Direct Examination	III	1936
Schwager, George W		
Direct Examination	. III	1587
Cross-Examination		1588
Re-Direct Examination	. III	1590
Sessenden, William E.—		
Direct Examination	. II	1270
Cross-Examination	. II	1272
Re-Direct Examination	II	1274
Re-Cross-Examination	. 11	.1274
Re-Cross-Examination		
Direct Examination	. III	1918
Cross-Examination	. III	1920
Re-Direct Examination	. III	1921
Skellenger, William E.—		
Direct Evamination	. III	1822
Cross-Examination	. III	1825
Re-Direct Examination	. III	1827
Re-Cross-Examination	. III	1828
Sharp, Mrs. J. A.—		
Direct Examination		1347
Cross-Examination :		1348
Re-Direct Examination	. II	1348
· · · · · · · · · · · · · · · · · · ·		

(xliii) .

PLANTING EXHIBITS Continued.

E .				
No.		dmitted		inted
III Town Grocery Store, New	-	l. Pag	e Vol.	Page
Tod. Winess Bender	a	618	•	
According Serviced Wheat, Witness		_ 4	* :	
	-	620	īv	45
From 1528 to 1932, Witness				
Uma		620	TV	48
III-Career, Witness Olive	1	621*		
THE LINE	-	621*	- vot pr	
Lamb Lamb	I	621*	Not pr	
Latine Interio, Witness Olive	I	621*	Not pr	
Wines Oliva	1	621*	Not pri	
Witness Clien	I	622*	Not pri	
Late Waters Olive	I	622*	Not pri	
IN Fine Carl, Wines Oliva	i	622*	Not pri	
Comment of the Commen	1	622*	Not pri	nted
Water Office	1.		Not pri	
Witness Oliver	I		Not prin	
III here Book Winess Oliva	1		Not prin	
And the second of the second o	I		Not prin	
Marine Posters, Wenner Olive	-		Not prin Not prin	
IN Winter Passes, Winness Oliva	1		Not prin	
William Chine	_	623*]	Not print	ted .
Law China			Not print	
The same of the sa			Not print	ed
Olive of Streethed Wheat, Witness				
Tame of the second	1 .1	23* N	ot print	ed

exhibit in evidence deleted in con-

PLAINTIFF'S EXHIBITS-Continued,

	Ex.	Admitted		Printed		
	No.	Vol.	Page.	Vol.	Page	
	139-Three Bundles of Sheets of Newspaper					
	Schedules, Witness Oliva	. 1	624*	'Not 1	orinted	
	140-Kellogg Package, Restaurant, Newark,		,			
	Witness Fagan		635*			
	141-Kellogg Package, Grocery Store, New		5		**	
	York, Witness Mund	. I	638*			
	142-Kellogg Package (in Part), Restaurant,					
	Hampstead, Long Island, Witness Par-					
	nell		641*			
	143-Kellogg Package, Grocery Store, Seaford,		,			
	Witness Tuthill		643*			
	144-Kellogg Package, Grocery Store, Brook-					
/	lyn, Witness Evans		651*			
	145-Kellogg Box, Cafeteria, Brooklyn, Witness					
*	Evans	1	652*			
	146-Menu, Cafeteria, Brooklyn, Witness Evans		655*	Not	rinted	
	147-Kellogg Box, Grocery Store, Witness Mc-		•			
	Crum	1	656*			
	148-New Carton, National Biscuit Co., Wit-					
	ness Oliva	. I	657*			
	149-Transcript of Annual Sales of Shredded					
	. Wheat, Witness Dunlap	I	675*	IV	50	
	150-Combined Schedule of Advertising Ex-	-				
	penditures, Witness Dunlap		675*	IV	51	
	151-Kellogg Carton, Cafeteria, New York,					
	Witness MacKay	I	682*			
	152-Kellogg Package, Restaurant, Fresno, Cal-				1.	
	ifornia, Witness Schapansky	II	716*			
	153-Kellogg Package, Black's Package Store,			2		
	Fresno, California, Witness Schapansky	11	717*			
	154-Kellogg Carton, Grocery Store, With Sales				1	
	Slip, Fresno, California, Witness Scha-					
	pansky	II	718*			

^{*}Formal offer and admission of exhibit in evidence deleted in condensing record.

PLAINTIPP'S EXHIBITS—Continued.

F.x. No.	Admitted	Delegant
		Printed Vol. Page
154-A-Kellogg Carton, Hotel Berry, Coffee		voi. Fage
Suop, Sacramento, California, Witness	3	,
Sowies	11 7274	· .
Sarra Sarra		
mento, California, Witness Combo		
156-Menu Card, Smith's Coffee Cup, Stockton,	II 727*	***
Camornia, Witness Rurkner		
157—Kellogg Carton, Smith's Coffee Cup, Stock-	II 732*	Not princed
ton, California Witness Part		
ton, California, Witness Burkner	II 732*	
158-Kellogg Carton, Foster's Lunch System,	7.8	
San Francisco, California, Witness	. ,	
Baird	II 7364	
159-Kellogg Carton, Grocery, Berkeley, Califor-		
nia, Witness MacCool	II 739*	
Carton and Purchase Slip Willer's		***
Store, Witness Fatio	II 743*	
ackage, Santa Clara California	- 10	• • • • • • • • • • • • • • • • • • • •
witness van Artsdale	I 767*	
Steamship Line, Ross California	,	
Witness Mears	T 11000 -	
	1 -1190* V	ot printed
. Witness Mears		
164-Menu Card, Restaurant Owner, San Fran-	L 1196* N	ot printed
CISCO, CRINOPHIA THIS		
165-Kellogg Carton, Large Size, Burlingame,	I 1235* N	ot printed
JIZE. Hillingsma		
California, Witness West II	1190*	
Burlingame, California		
Withess West		
Tellogg's Window Display Carton Des	9 /	
. Ingaine, California Witness W.	1191*	
Renogg's Window Display Carton Bue		
migatue, California, Witness Wash	11016	
Restaurant, Owner Wit	1191*	
ness Lee		
~ *Tormal offer and admission of exhibit in evidensing record.	1255*	

and admission of exhibit in evidence deleted in condensing record.

PLAINTIFF'S EXHIBITS-Condinued.

*		
Ex.	Admitted Prin	ted
No.	Vol. Page Vol.	Page
170-Menu Card, With Paper Attached,	Restau-	
rant owner, Witness Fierstine	II 1259* Not p	rinted
171-Kellogg Carton, Witness C. oper .	II 776*	
172-Kellogg's Wheel of Knowledge	e, San	and the same of the same of
Diego, California, Witness Coop	per II 776* Not pr	rinted
'473-Kellogg' Carton, Purchaser, San	Diego,	
California, Witness Cooper		
174-Kellogg Carton, Purchaser, Los A		
California, Witness MacFarland	II 783*	. 11
175-Kellogg Carton, Los Angeles, Cal		
Witness MacDuffie		
176-Kellogg Carton, Purchaser, Los A	· · · · · · · · · · · · · · · · · · ·	
California, Witness MacDuffie		
177-Kellogg, Carton, Purchaser, Gl		6
California, Witness Anderson		5
178—Kellogg's Individual Carton, V	The state of the s	
Lierley		
179-Kellogg Carton and Cash Slip, V		
Ruch		4
180—Clipping, Brownwood Bulletin, I		
Sales, Witness Wilde :		inted
181—Fort Worth Grocery Co., Price-List		mteu
ness Wilde		inted.
		inted
182—Kellogg Carton, Witness Bullock		
183—Kellogg Package, Witness Burke		
184-Kellogg Carton, Cellophane Front		
ness Mahaffey		
185-Kellogg Carton, Witness Tutt		
186-Kellogg Carton, Witness Reynolds		* * *
187—Sales Slip, Witness Staloup	· ·	inted
188-Kellogg Carton, Witness Staloup .		
189-Slip of Paper, Witness Hunsaker		inted.
190-Kellogg Carton, Witness Hunsaker	II 907*	

^{*}Formal offer and admission of exhibit in evidence deleted in condensing record.

PLAINTIPP'S EXHIBITS-Continued.

Ex		articou.	
No.	Ad	mitted	Printed
			Vol. Pag
191-Kellogg Package, Witness Guthrie			
os Carton, Witness Chathair			
		938*	Not printe
Tracilla Independent 117.			. or printe
Guthrie	II	938	Not printer
			···
		943*	Not printed
or the Winona Republican Line			- vor brinte
Dated January 20, 1933, Witness Kol-	_		
		1411*	Not printed
198-Newspaper Advertisement of the Decatur			. printed
Home Stores, Witness Kolvoord	III	1415* -	Not printed
199—Old-Style Kellogg Folder Cut, Witness			· · · · · · · ·
Kolvoord	III I	1415+ h	Not printed
200-Newspaper Advertisement, Reading Eagle,			or britted
April 28, 1932, Witness Kelly 201-A—Newspaper Clipping, Kalamaron Co	III.	1443* N	Not printed
201-A—Newspaper Clipping, Kalamazoo Ga-			or printed
Wahan	111: 1	476* N	lot printed
201-B—Sheet, Containing Same, Kalamazoo Ga-		. 5	or branted
zette, March 2, 1933; Newspaper Clip-	* *		
ping, Witness Mahan I 202-Price-List Put Out by the Kellogg Com-	II, 1	476 N	Ot printed
202-Price-List Put Out by the Kellogg Com-			or printed
pany, Dated February 1, 1933, Witness			
Mahan II	I 14	76* I	V 53
Ficture of Kellogg's What		-	. 33
Wheat Biscuit Containing Two Biscuit			
in a Dish to Be Addressed to Store		-,	
Managers, Witness Mahan	I 14	77 11	7 55
204—Tear Sheet From the Battle Creek, Michi-			. 33
gan, Moon Journal, October 21, 1932,			
Witness Mahan III	147	7 Not	printed
The state of the s			P-micu.
ness Mahan III	147	7 Not	printed
Formal offer and admin	1		Printed
densing record.	dence	deleted	in con-

PLAINTIFF'S EXHIBITS-Continued.

	Ex. No.		nitted Page	Printed Vol. Page
	206-Sheet From the News Telegraph, Dated			
	March 10, 1933, Sharen, Pa., Witness			
*	Ander	III	1638	Not printed
	207-Page Twenty-nine of the Pittsburgh		-	
	Press, Dated March 25, 1932	III	1638	Not printed
	208-Package of Hat Cleaner, Witness Rush .		1727	
	209-Package of Camel Cigarettes, Witness	1	•	
*	Rush	III	1728	
	210-Copy of the Reading Eagle, May 5, 1932,			
	Witness Miller	Ш	1846*	Not printed
	211-Page of the Reading Eagle, February 4.			
	. 1932, Witness Miller	ш	1846*	Not printed
4	212-Sheet Containing Ad of the Kellogg Com-		10.0	reet printed
-	pany of the Reading Eagle, May 12,			
	1932, Witness Miller	TIT	1846*	Not printed
	213, 214—(Numbers Skipped, No Such Exhib-	***	1010	reor printed
	its Marked.)			
	215—Package Resembling Plaintiff's Exhibit	:		
	No. 166 (a Kellogg Shredded Whole			0
	Wheat Biscuit Carton), Witness Hop-			
	kins	111	1871*	
	216—Package, Resembling Plaintiff's Exhibit	***	10/1	
	No. 165, Witness Hopkins	***	1972+	
		111	10/2	
	217—Cardboard Liner, Used by Kellogg Com-			
	pany in Whole Wheat Biscuit Cartons,	***	10774	
	Witness Hopkins		10/2*	*** ***
	218—Easel or Study Advertising, Witness Hop-	***	10744	Non-ofined
	kins	111	10/4-	Not printed
	219—Sheet of the Reading Eagle, March 31,	***	1075+	Mas anims d
	1932, Witness Hopkins	111	18/5*	Not printed
	220—Sheet of the Reading Eagle, March 5,	***	10756	M-1-1-1
	1932, Witness Hopkins		18/5*	Not printed
	221—Sheet of the Reading Eagle, March 17,		10756	NY
,	1932, Witness Hopkins	III	1875*	Not printed.

^{*}Formal offer and admission of exhibit in evidence deleted in condensing record.

PLAINTIFFS EXHIBITS-Continued.

Ex.	Adn	nitted	Printed
No.	Vol.	Page	Vol. Page
222-Copy of Modern Merchant and Grocery	7		
World, Witness Hopkins	. III	1875*	Not printed
223-Cash-and-Carry Bulletin, Witness Hopkin			
224-William Montgomery & Co., Price-List	,		
Witness Hapkins	. III	1876*	Not printed
225-Copy of Modern Merchant and Grocery			* *
World, February 9, 1933, Witness Hop	-		
kins	. III	1876* °	Not printed
226-Standard Government Form of Bid, Wit			
ness Hopkins		1879	Not printed
227-Price Bulletin of Provisional Contracts			
Witness Hopkins		. 1879 -	Not printed
228-Copies of Requisitions, Consisting of Sin			
Sheets, Witness Ruckman	i III	1912*	Not printed
229-Advertisement, Minneapolis Journal, April			**
30, 1932, Witness Ruckman	, III	1940*	Not printed
230-Breakfast Menu, Hotel Paxton Coffee		-0	
Shop, Witness Dubois :			Not printed
231-Menu, Main Dining-Room, Hotel Paxton			
Witness Dubois	. III	1947*	Not printed
232-Room-Service Menu, Hotel Paxton, Wit-			
ness Dubois	III .	1947*	Not printed
233-Board of Control Specifications, Wit-		•	
ness Sawyer	III .	1965*	Not printed
234-Consolidation Agreement, Dated May 19	,		
1890, Witness Malone	. II	. 958*	Not printed
235-Copy of Certificate of Incorporation, Dated	-		
May 7, 1900, Witness Malone	. ·II	978	Not printed
236-Letter, Division Passenger Agent, Atchi-			
son, Topeka & Santa Fe Railway Co.	,		
April 13, 1933, Witness Malone	. II	979	Not printed
237-Certified Copy Resettled Final Decree in	1	27 *	
Shredded Wheat Company Agains	t		
Humphrey Cornell Company	III	2005	IV 57

^{*}Formal offer and admission of exhibit in evidence deleted in condensing record.

PLAINTIFF'S EXHIBITS-Continued.

Ex.	Admitted Printed Vol. Page Vol. Page
8	av
Cand The Fenway Inn	
- (24) Hustraum	277 67
Diamond Shape Biscuit	
E-hibit No 240	
Cong Shaped Biscuit	******
Donahnut-Shaped Bis	scuit
E-Libit NO 246	
- Cainch Round-Cut B	iscuit
This No (43) as	
- 2 trab Pound-Cut B	iscuit
Enhabit NO 494	
- 2 inch Round-Mou	ided Discuit
- h of I WO DE	Cuit 0. 191
This is a second of the second	
246-Box of Biscuit Baked in	Automatic 322
247—Sheet Tampa Morning T	1 303 IV 123
248-Sheet The Tampa Daily	Times, July 5, I 303 IV 125
249—Sheet The Saint Paul Pior 26, 1933	eer Press, April
26, 1933	ment Printing . I 304*
26, 1933	s in Connecticut
251-Stipulation Re Deposition	I 306 IV 127
252-Four U. S. Trade-mark	Registrations I 315 IV 129
- Ladmir	ssion of exhibit in evidence deleted in con-

^{*}Formal offer and admission of exhibit in evidence deleted in condensing record.

PLAINTIPF'S EXHIBITS-Continued

a

THE S EXHIBIT	rs-Contin	ned.		
Ex.				
No.	** *	itted	Pri	nted
No. 85,186, January 30, 1912				Page
170,723, January 15, 1924		315	IV	129
No. 210,593, August 17, 1026		315	IV	133
No. 213,450, May 25 1026		315	IV	131
wenty-seven State Registeration		315	IV	135
Trade-mark Shredded	of			
254 Certificate of Incorporation, Natural F	I	315	Not p	rinted
Co F	ood			
Co Order Supreme Co	II 1	004 1	Vot pr	inted
New York Australia Co	urt,			
New York, Authorizing Change	of-			3
Name to Shredded Wheat Company	II 10	005 h	lot pri	inted
Of Ciganization National D				Jeen.
cuit Co	II 10	05 N	ot pri	nted
Timenument of Charter of National D	*-		y y	cd
cuit Co.	II 10	05 N	ot pri	had
Second Amendment of Charter of Nation			or brit	ited
Discuit Co.)5 N	ot end	14
Amendment of Charter of Marian	-1		ot prin	ited .
Discuit Co.		5 N		
Sarc, Solli April, 1930: From Chan		o No	ot prin	ted ^o
ucu Wheat Company to Matin	- 1			
Discuit Co.				
Carton Furchased at Kenosha on Daniel			t print	ted
Der 24, 1932				
and B Used in Cross France		**		
mation of Witness Danter			*	
report on Hot and Cold Careala			printe	
report on not and Cold Ceresta			printe	
to by Witness D.			printe	
266-Package of Plaintiff's Reprocessed Bis-	LI 1145	Not	printe	d
cuit	t			
267-Package of Plaintiff's Reprocessed Bis-	III 2018			
cuit				
268—Package of Plaintiff's Biscuit, Part Re-	III 2018			
processed Biscuit, Part Re-			-	1
processed	III 2018			
269—Bundle of Photographs	III 2018	Note	rinted	
(lxiv)				
,				

PLAINTIFF'S EXHIBITS—Continued.

Ex.			Ac	dmitted	Pri	inted
No.			Vol	. Page	Vol.	Page
270-Package	Like Plai	ntiff's Exhibit	2, Kel-			
logg's	s Shredded	Whole Wheat	Biscuit III	2018		
271-Defenda	nt's Carton	Pur Out Se	ptember,		- 1	
1932	*******		i III	2018		
272-Carton	Kellogg's S	hredded Whole	Wheat III	2018		
273—Decree	in Case of	Natural Food	Co. v.			
Bulkl	ey, et al		III	2020	Notp	rinted
274—Carton (Champion F	lake Butters	III	2024		
275—Dupon*	Company P	rice-List on Ce	llophane III	2036	Not p	rinted
P	LAINTIFE	S EXHIBITS	UNDER	RULE 4	6.	
A-Publication	n of the Cy	rus Curtis Pub	. Co III	2019	Notp	rinted
		t of Appeals i				
		Appeals in V		2020	Not p	rinted
		v		2020	Not p	rinted

DEFENDANT'S EXHIBITS

Ex.		,		
No.		dmitted	P	rinted
	Vo	d. Pag	e Vol	Page
1-Letter of Mr. Sweet		I 340	Not	printed
2-Letter of Mr. Sweet		I 340	Not	printed
3-A-Letter of Mr. Sweet		I 340	1.	printed
3-B-Letter of Mr. Sweet		I 340		printed
4-Kellogg Carton, Witness Hamilton	1	3574		
5-Kellogg Carton, Witness Hamilton	1	3574		
6-Package Kellogg Whole Wheat Biscuit	1	495*		
7-Slip of Witness' Signature Torn Off Plain-				
tiff's Exhibit No. 54, Witness Loughlin	1	5024	Not	printed
8-Box or Carton, Kellogg's, Witness Dodge	I			
9-Letter and Enclosure; News Release Re-		201	***	* * *
Suit Against Kellogg, Witness DeWeese	1	604	IV	137
10-Newspaper Article, Filing of Suit by				13/
Shredded Wheat Company Witness				
DeWeese	I	604	IV	190
11-Quaker Muffetts Package, Witness Wein-		004	IV	138
stock	I	667*	-	
12-Package, Codfish, Witness West	II	667*	***	
13-Package, Baker's Cocoanut, Witness West		1194*		***
14-Package, Kellogg's Whole Wheat Flakes,	II	1194		* * *
Witness West				
15-Package, Kellogg's Muffetts, Witness West	II	1194*	***	
Triscuit Carton Witness West	II	1194		. 5.
16—Triscuit Carton, Witness Powell	II	1266		***
17-Wheat Krumbles Carton, Witness Thomp-				
19 Poster 377	II	1275*		
18-Poster, Wheel of Knowledge, Witness			*	
Thompson	11	1277*	Not pr	inted
19-Poster, Jumbo Kellogg Carton, Witness			,	
Thompson	H	1277*	Not pr	inted
20-Sheets, Ads, Witness Thompson	II	1278*	Not pr	inted
	11	1285		
	II	1285		
23 Vallogg's Day W's my	II	1285		

^{*}Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS-Continued.

Ex.	Adn	nitted	. Pri	nted
No.	Vol.	Page	Vol.	Page
24-Kellogg's Wheat Krumbles, Witness				
Thompson		1285		
25-Kellogg's Rice Krispies, Witness Thomp-				
son	II	1285		
26-Kellogg's Kaffee Hag, Witness Thompson	II	1285		
27-Kellogg's Wheat Krispies, Witness Thomp-				
son		1285	***	
28-(Number Skipped, No Such Exhibit				
Marked.)		**		
29-Kellogg's Whole Wheat Flakes, Witness				
Thompson		1285		
30-Package of Tear Sheets From San Fran-		-		
cisco and Oakland Papers		775*	Not	printed
31-Package of Kellogg's All-Bran, Witness				
Anderson		1339*		
32-Package of Post's Whole Bran, Witness				
Anderson	. 11	1339*		
33-Package of Uneeda Graham Grackers				*
Witness Anderson	· II	1339*		
34-Package of Brown's Graham Crackers				
Witness Anderson		1339*		
35-Package of Sunshine Dutch Rush, Wit	-	* .		
ness Anderson		1339*		* * *
36-Package of Holland Rusk, Witness Ander	-			
son	. 11	1339*		***
37-Package of Brown's Vanilla Wafers, Wit	**			
ness Anderson	. 11	1339*		
38-Package of Uneeda Vanilla Wafers, Wit	- '	-		٠
ness Anderson		1339*		+ x x 2
39-Package of Van Camp's Spaghetti, Wit			* .	
ness Anderson	. II	1340*		
Package of Thrift Spaghetti, Witness An		1		
derson	. II	1340*		

^{*}Formal offer and admission of exhibit in evidence deleted in condensing record.

PLAINTIFF'S EXHIBITS-Continued

Ex.	Ad	mitted	Pri	inted
No.	Vol.	Page	Vol.	Page
55-B-Kellogg Carton, Restaurant, Chicago,		-		
Witness Holmer	I	504		
56-Menu Card, Restaurant, Chicago, Witness				***
Holmer	I	504	Note	rinted
57-Kellogg Carton, Grocery Store, Chicago,	*			· mited
Witness Ristig	I	512	4.1	
58-Kellogg Carton, Food Shop, Chicago, Wit-	•	312		
ness Korsen	I	513		•
59-Kellogg Carton, Grocery Store, Chicago,		313		
Witness Rachlin	1	515	. 1	
60-Kellogg Carton, Grocery Store, Chicago,		313		***
Witness Ritter	I	516	1.4	
61-Kellogg Package, Grocery Store, Chicago,		. 10	***	***
Witness Golden	1	217		
62-Kellogg Box, Davie's Lunch, Chicago,	1	517	* * *	
Witness Skewes		500		
63-Kellogg Carton, Restaurant, Washington,	1 .	520		* * *
D. C., Witness Kleeman			9	
64-Kellogg Carton, Grocery Store, Hagers-	I.	528		
town, Md., Witness Schmidt				
65-Kellogg Box, Restaurant, Hagerstown,	I	533	***	* * *
Md Witness Colombia		-		
Md., Witness Schmidt	·I	533	***	
66-Bill From Restaurant, Hagerstown, Md.,	٥			
Witness Schmidt	I	533	Not pr	inted
67-Keilogg Box, Restaurant, Hagerstown,				
	I	533		
68-Bill, Marked One Box Shredded Wheat,			o .	
Grocery Store, Chambersburg, Pa., Wit-		4		
ness Ludwig	I	534	Not pri	nted
69-Kellogg Box, Grocery Store, Chambers-				* **
burg, Pa., Witness Ludwig	I	535	***	
70-Bill From Restaurant, Chambersburg, Pa.,	*			
Witness Ludwig	I	535	Not pri	nted
71-Kellogg Box, Restaurant, Chambersburg.				
Pa., Witness Ludwig	T	535		

PLAINTIFF'S EXHIBITS-Continued

Ex.	Admitted		Printed		
		Page	Vol.	Page	
72-Sales Slip From Restaurant, Baltimore,					
Witness Johnson	1	\$	Not	printed	
73-Kellogg Carton, Restaurant, Baltimore,					
Witness Johnson	1	549*			
74-Kellogg Package, Lull Grocery Store, Kal-					
amazoo, Mich., Witness Doyle		552*			
75-Kellogg Carton, Sunshine Grocery Com-					
pany, Kalamazoo, Mich., Witness Doyle		553*			
76-Kellogg Package, Grocery Store, Kalama-					
zoo, Mich., Witness Doyle		553*			
77-Kellogg Carton, Grocery Store, Kalama-		44			
zoo, Mich., Witness Doyle	1	553*	•		
78-Kellogg Carton, Grocery Store, Battle					
Creek, Witness Doyle	· I	553*			
79-Kellogg Carton, Grocery Store, Battle	-	-			
Creek, Witness Doyle		554*			
80-Kellogg Package, Grocery Store, South					
Norwalk. Conn., Witness Cavalier		612*			
81—Purchase Stip, Grocery Store, Stamford,		,-			
Witness Tuttle	I	614*	Not	printed	
82-Kellogg Carton, Grocery Store, Stamford,		-			
	I	614*			
Witness Tuttle Witness Witness Witness					
83-Newspaper Schedules (Summary), Wit-	I	.571*	iv	11	
ness DeWeese				1	
84—Compilation of Numerous Sheets Entitled					
"Advertising and Promotional Expense					
in the United States, Canada, and Eng-		571*	IV	41	
land," Witness DeWeese					
85-Paper, Letter From Walter H. Page, Wit-	. 1	572*	· IV	43	
ness DeWeese		312			
80-List of Publications Referring to Shredded	. 1	572*	Not	printe	
Wheat, Witness DeWeese	. 1	312	1401	pi mice	
87 to 112-Books or Albums Containing Rec-					
ords of Shredded Wheat Advertising		5779	Not	printed	
Witness DeWeese	. 1	312	1401	brunce	

^{*}Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANTS EXHIBITS

FE.	-	Luiued.	* 9
No.	Ad	mitted	Printed
	Vol.	Page	Vol. Page
logg's Sheeded 110			- Lage
logg's Shredded Wheat	11	1017	Not printed
THE PROPERTY OF THE PROPERTY O			
logg's Shredded Wheat	11	1017	Not printed
	II	1025	Not printed
- det inchients of Di-			- Printed
Woman's Home Companion	II	1035	Not printed
	H	1035	Not printed
overnment Form of Bid D			- or printed
partment of Interior	II	1043	Not printed
openication for Lavanta (D			Not printed
Poods)	II	1043	Not print 1
Did Naval Supply Decest		_	Not printed
ment, Nortolk, Va. May 16 1022	II	1044	N-4
		1017	Not printed
TOIK, Va., March 15 1022	II.	1045	
Defendant's Farly Advanti-		1043	Not printed
ments of Kellogg's Toasted Wheat Bis- cuit			
		047 N	lot printed .
Wheat Biscuit I			
14/-Blank Carton Sanitas Toasted Corn	I 10	048	
Flakes I			
148—Advertisements Kellogg's Shredded Krum-	I 10)50 .	
Dica			
149 Carton of Kellogg's Krumbles, Shredded	I 10	152 N	ot printed
Whole Wheat			
150—Carton Kellogg's Wheat Krumbles II	10	53	
- Carton Reiniph & Wheet V 11			
152-Letter May 3, 1933, N. A. Relfrich to Kel-	10	8	7
IDDO S Saler Co			
53-Proposal April 8, 1933, to Navy Purchas-	10	59 No	t printed
ing Officer, New York	. 2	* "	
ing Officer, New York	100	0 No	t printed
May, 1933, Port of New Vest			
May, 1933, Port of New York II	106	1 No	printed
		. 10	

(bxxiv)

DEPENDANT'S EXHIBITS-Continued.

F.x.	Adr	nitted	Printed
No.	Vol.	Page	Vol. Page
155-Bid March 3, 1933, Navy Purchasing			
Office, New York	11	1062	Not printed
156-Bid June 8, 1932, Naval Air Station, Lake-			
hurst, N. J	· II	1062	Not printed
157-Bid February 23, 1933, Selfridge Field,			
Mich	II	1063	Not printed
158-Bid May 9, 1933, West Point, N. Y	11	1063	Not printed
159-Invitation for Bid August 22, 1932, Vet-			
erans Administration Home, National			
Military Home, California	11	1064	Not printed
160-Invitation for Bids, October 25, 1932, Vet-			
erans Administration, Washington, D. C.	II	1064	Not printed
161-Invitation for Bids, October 25, 1932, U. S.			70000
Marine Hospital, St. Louis, Mo	II	1064	Not printed
162-Bid March 21, 1932, Fort Benjamin Harri-			
son, Ind	11	1065	Not printed
163-Bid September 8, 1932, Fort Hoyle, Md	II	1065	Not printed
164-Invitation for Bids, May 19, 1932, U. S.			
Property and Disbursing Officer, Tren-			
ton, N. J	II	1065	Not printed
165-Bids January 9, 1932, The Army War Col-			
lege, Washington, D. C	II	1065	Not printed
166-Bid August 18, 1932, Fort Moultrie, S. C	II	1066	Not printed
167-Bid November 11, 1932, Langley Field, Va.	II	1066	Not printed
168-Bid January 19, 1933, Fort Crook, Neb	II	1066	Not printed
169-Bid March 25, 1933, Fort McClellan, Ala	II	1066	Not printed
170-Bid April 4, 1932, Fort Mason, San Fran-			
cisco, Cal	II	1066	Not printed
171-Bid July 21, 1931, Fort Warden, Wash	II	1067	Not printed
172-Bid July 13, 1932, Quartermaster Supply			0 .
Officer, Brooklyn, N. Y	II	1067	Not printed
173-Bid Marine Barracks, Navy Yard, Ports-			
mouth, N. H	II	1068	Not printed
174-Invitation for Bids, Pennsylvania Depart-			
ment of Health, Sanitarium No. 2, Cres-			
son, Pa	II	1068	Not printed

DEFENDANT'S EXHIBITS-Continued."

Ex.		mitted	
175-Specification for Cereals, Pa., December		Page	Vol. Page
10, 1932		1000	Not and and
176—Specifications State of South Dakota			Not printed
			Not printed
177—Request for Bids, December 19, 1932, Maine 178—Proposal, Rockland State Hospital, Orange-		1070	Not printed
burg, N. Y.		1020	NT-4
179-Invitation for Bids, March 13, 1933, Ten-	11	10/0	Not printed
nessee	-	1070	· Matariated
180-Order April 1, 1933, Wassaic State School,		10/0	Not printed
Wassaic, N. Y.		1071	Not printed
181-Order January 16, 1933, Newark State	11	10/1	Not printeg
School, Newark, N. J.	TT	1071	Not printed
182-Order March 23, 1933, Great Meadow		10/1	Not printed
Prison, Comstock, N. Y.		1071	Not printed
183—Order January 14, 1933, Willard State Hos-	. 11	10/1	Not printed
pital, Willard, N. Y.	п	1071	Not printed
184—Specifications Division of Purchases and		10,1	Not printed
Supplies, Springfield, Ill.	II	1072	Not printed
185—Individual Carton Kellogg's Whole Wheat		10,2	. Not printed
Biscuit	II	1072	
186-Large Carton Kellogg's Whole Wheat	••		
Biscuit	II	1072*	*1
187-Menu Card, Chicago, Milwaukee, St. Paul			
and Pacific	·II	1074	Not printed
188-Menu Card, Hotel Fort Shelby, Detroit,			
Mich	II	1075	Not printed
189-Bid March 13, 1933, Naval Supply Depot,			2
Norfolk, Va.	II.	1088	Not printed
190-Bid February 11, 1933, U. S. Marine Corps,			
Navy Building, Washington, D. C	11	1089	Not printed
191-Bid of Price Brothers, May 18, 1933, Naval	3		
Home, Philadelphia, Pa	II	1091	Not printed
192-Plaintiff's Individual Carton, Large Biscuit	II	1098	
193-Blueprint Diagrammatic Sketch Defend-			
ant's Mill	П	1107	Not printed

^{*}Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS-Continued.

Ex.	Admitted Vol. Page	Printed Vol. Page
No.	r's	
No. 194—Photographs (13) Illustrating Defendant Operation		Not printed
sor Sample of Shreds First Time Inroug	gu ø .	
To allo	- ,-	
105 Sample of Shreds Second Time Through	gu	
Dalla .		•••
sor Sample of Shreds Third Time Through	gn	
TO STATE OF THE PARTY OF THE PA		
Fifteen Biscuit at 400 Degre	ccs	
And TImme		6
Discouit With Brown Band		,
Discourt With Offerin Band		***
200—Sample of Biscuit With K Stamped There	eon II 1123	0
201—Sample of Biscuit With Red Food Color 202—Sample of Biscuit With Red Food Color	ring II . 1123	***
202—Sample of Biscuit With Brown Food Col	lor-	4.
203—Sample of Biscuit With Brown	II 1124	
ing	on	
204 Sample of Biscuit With Green Strip	II 1124	
Discourt With Green Strip	4	
Riscuit With K Imple	.3304	
With Brown Stripes		
- I MISCHIE WILL TO		
Thereon	11 112	
Sketch A Attache	u to	0
Thereon	II 113	0
Exhibit 262	II 117	9
210—Sample Diamond Shape Biscuit	II 117	, ,
		39 :
		10
		40
213—Sample Biscuit Enclosed in Envelope	Plain-	
		51*
215—Large Card Carrying tiff's and Defendant's Cartons		
tiff's and Derendant's sion of exh	nibit in eviden	e deleted in con

^{*}Formal offer and admission of exhibit in evidence deleted in condensing record.

DEPENDANT'S EXHIBITS-Continued.

Fx.	Admitted				
No.	Vol.	Page			
216-Large Card Carrying Samples of Cartons					
of Defendant's Cereal Products		1151*			
217-Defendant's Shipping Container Case No.	• •			- 3	
360		1152			
218-Defendant's Shipping Container Case No.			*	* *	
324	II	1152			
219-Window Display Card of Plaintiff	II	1152			
220-Samples of Defendant's Cartons				***	
221-Photographs (2) of Store Displays	II	1153	Notp	rinted	
222-Letter June 2, 1932, C. K. Brace, Manager,					
National Biscuit Co., Denver, Col., to		. "			
All Jobbers	II	1154	IV	.169	
223. Chart of Kellogg's Shredded Wheat Bis-					
cuit Cartons	' II	1155	Not p	rinted	
224 Three Cartons Kellogg's Shredded Krum-	1				
bles	11	1155			
225-Advertisement Chicago Daily Tribune,					
June 2, 1928	II	1155	Not p	rinted	
226-Advertisement The Battle Creek Moon		.1			
Journal, May 25, 1922	II	1156	Not p	rinted	
227-Open Letter of Plaintiff to "Dear Madam"	II	1157	Not p	rinted	
228-Carton Complimentary Samples Shredded			1	1	
Whole Wheat	II	1157			
229-Pamphlet Fifty Ways of Serving Shredded					
. Whole Wheat	·II	1157	Not pr	rinted	
230-Recipes for New and Delicious Energy					
Dishes	11	1157	Not pr	rinted	
231-Carton Kellogg's Battle Creek Shredded		4			
Wheat	II	1158	,		
232-Registration No. 276,592, Battle Creek,					
Shredded Wheat	II.	1158	Not pr	inted	
233-Chamber's Journal, January 27, 1900			Not pr		

^{*}Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS—Continued.

Ex.	Admitted		Printed		
No.	Vol.	Page			
234-File Wrapper and Contents, Trade-mark					
Registration No. 178,725, Shredded					
Wheat	II	1159	·IV	171	
235-File Wrapper and Contents, Trade-Mark	41	*			
Registration No. 213,456 Shredded				٠,	
Wheat	II	1159	IV	181	
236-Book of Trade-Mark Registrations of			14.		
Plaintiff	II	1160	IV	193	
237—Collection of Correspondence	II	1161	Notp	rinted	
238-Samples of Shredded Paper, Shredded Gel-					
atine and Shredded Cellophane	II	1161			
239-Reproduction of Kellogg Biscuit Prior to					
1920	II	1162	Not p	rinted	
240, 240-A, 240-B-Box of Split Peas, Lima					
Beans and Pop Corn, With Cellophane					
• Windows	II	1163			
241-Advertisements in Grocery World, Five		. 0			
Sheets		1165	Not p	rinted -	
242-Perky U. S. Patent No., 548,086, October					
15, 1895	11	1166	IV	207	

DEFENDANT'S EXHIBITS-Cont			
Ex.	nued.		
	nitted		
242—Book of Paters Vol.	Page 1	Printed Vol. Page	
242—Book of Patents Issued to Plaintiff, Viz.:		oi. Page	
Perky & Ford U. S. Patent No. 502,378,			
. ragust 1, 1893	1166		
		V 1	
	1166		
ary 8, 1895		V 5	
Perky U. S. Patent No. 532,480, Janu-	1166	V 11	
ary 15, 1895 II 1			
Perky U. S. Patent No. 532,481, Janu-	166	V 15	
ary 15, 1895 II 1	E.		
Perky U. S. Patent No. 532,697, Janu-	166	21	
ary 15, 1805			
Perky U. S. Passes V II 11	166 V	25	
Perky U. S. Patent No. 532,698, Janu-			
ary 15, 1895 II 11	66 V	29	
with MO 341441 E-L			
Perky U. S. Patent No. 533,552, Febru-	56 . V	33	
WO. 3.1.557 Fab.			
Perky II S Parky II 116	6 ·V	37	
Perky U. S. Patent No. 533,553, Febru-	1		
ary 5, 1895 II 116	6 v	41	
O. S. Patent No. 533 554 Fab.	•	41	
ary 5, 1895	5 v	45	
0. S. Patent No. 533 555 Feb.		43	
Montgomers II 66	. 17	40	
. S. Patent No. 533 921		49	
1 cornary 5, 1895	V		
U. S. Patent No. 548 086 Octo	V	55 °	
ber 15, 1895	37	***	
Leray U. S. Design Patent No. 24 699	٧	. 59	
September 17, 1895	37		
City U. S. Patent No. 571.284 Novem	, V	61	
ber 10, 1896	1.32		,
Terky U. S. Patent No. 598.745 - Fabour	V	65	
ary 8, 1898 II 1166	12	-	
1100	V	77	
/4 .			

DEFENDANT'S EXHIBITS-Continued.

Ex.		Ad	mitted	Pri	nted	
No.		Vol.	Page		Page	
	Perky U. S. Patent No. 614,338, Novem-				0	
	ber 15, 1898	II	1166	V	81	
	Perky U. S. Patent No. 618,288, Janu-		-			
1	ary 24, 1899	II	1166	v	87	
	Perky U. S. Patent No. 667,892, Febru-			٩		
	ary 12, 1901	II	1166	V	91	
•	Perky U. S. Patent No. 678,127, July					
	9, 1901	· III	1166	V	109	
	Perky U. S. Patent No. 678,625, July					
	. 16, 1901	II	1166	· V:	121	
	Perky U. S. Patent No. 681,656, August					
	27, 1901	II	1166	$\cdot \mathbf{v}$	135	
	Burbank U. S. Patent No. 683,100, Sep-		۵		*	
	tember 24, 1901	II	1166	V	143	
	Burbank U. S. Patent No. 683,101, Sep-					
	tember 24, 1901	II	1166	V	149	
	Burbank U. S. Patent No. 684,789, Oc-	* .		*		
	tober 22, 1901	II	1166	V	155	
	Burbank U. S. Patent No. 685,671, Oc-					
	tober 29, 1901	H	1166	V	165	
	Perky U. S. Patent No. 713,795, Novem-			1		
	ber 18, 1902	II	1166 .	V	169	
	Perky U. S. Patent No. 746,145, Decem-		-	•		
	ber 8, 1903	11	1166,	V	173	
	Burbank U. S. Patent No. 770,159, Sep-			٠	6	
	tember 13, 1904	11.	1166	V	181	
	Horner U. S. Patent No. 785,554, March					
	21, 1905	H	1166	V	189	
	Perky U. S. Patent No. 797,604, Au-					
	gust 22, 1905	H	1166	V	201	
	Smith U. S. Patent No. 1,195,114, Au-		•		1 5	*
	gust 15, 1916	H	1166	V	225	
	Anderson U. S. Patent No. 1,334,429,				•/	
	March 23, 1920	II	1166	V	231	٠.
	House U. S. Patent No. 1,592,768, July					, ,
	13, 1926	II	1166	V	243	

DEPENDANT'S EXHIBITS Continued

Ex.		
No.	Admitted	Printed
41-Package of Swans Down Biscuit Mix,	Vol. Page	Vol. Pag
Witness Anderson	II 1340	
- sauce Discript Flows Michael Michael		
The state of the s	II 1340*	
Officeda Assorted Risewit Win		*** ***
ALIGETSON	II 1340*	
Summine Specialties Assert		*** ***
ment, Witness Anderson	II 1340a	
Daker's Cocoanut, Witness An		*** ***
. GC180II	TT 12404	
or Premier Spaghetti Witness		*** ***
Anderson	77	
47-Package of Van Camp's Kidney Beans,	11 1340*	****
Witness Anderson		
48-Package of Premier Beans and Pork, Wit-	1! 1340*	
ness Anderson		
49—Package of Van Camp's Spaghetti, Witness	II 1340*	
Anderson Spagnetti, Witness		
Anderson	II 1340*	
Witness Anderson	*	
Witness Anderson	I 1340*	
51-Package of Van Camp's Hominy, Witness		
Anderson	I 1340*	***
52-Package of Beech-Nut Pork and Beans,		
Witness Anderson I	I 1340*	
53-Package of Battle Creek Fig and Bran,		
Witness Anderson	1340*	
Lackage of Van Camp's Hominy Wis	1.	
ness Anderson	1340*	
Jo-Package of Beech-Nut Spaghetti Wit-		***
ness Anderson	1340*	
Package of Baker's Sweet Potato Shred-		** ***
icts, Witness Anderson	1340*	
Package of Dunham's Original Shred Co-	.040	** ***
coanut, Witness Anderson II	1340*	
*Formal offer and admission of the	1010	• • • • • •

^{*}Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS-Continued

Ex.				
**		mitted Page		
58-Package of Baker's Cocoanut seed,	4	rage	V OI.	rage
Witness Anderson	II	1340*		
59-Package of National Shredded Wheat Bis-	••	1010		
cuit, the Larger Individual Carton,		A.		
Witness Baskett		1342*		
60-Package of National Shredded Wheat Bis-	-			
cuit, the Smaller Individual Carton,				*
Witness Baskett	II	1342*		
61-Photograph of the Interior of the Wyatt				
	II	1344	Note	orinted
62-Package of Post Toasties, Corn Flakes		905*		
63-Package of Genuine Egg Noodles		9054		
64-Postal Card of Clover Farms Store, Reads,				
"Valuable Coupon," Witness Walters	Ш	1402*	Notp	rinted
65-Jumbo Carton Display, Witness Kol-				
voord 1	II.	1405*		
66-Display Piece With Stand, Picturing a Sau-				
cer With Two Biscuit, Witness Kol-				
voord	H	1406*		
67-Grocers' Display Piece Which Holds, Car-				
ton Kellogg's Whole Wheat Biscuit,				
Witness Kolvoord I	II	1406*		
68-Sheet of Day Advertisements, Winona Re-				
publican Herald, January 20, 1933,				
Witness Kolvoord I	II	1416	Not pr	rinted
69-A and 69-B-Advance Sales Notice, Consist-				
ing of Two Sheets, Witness Chapelle. I	11	1418*	Notp	rinted
70-Package, Kellogg's, Witness Hatfield I	II	1444*		***
71-Package of Shredded Wheat, Witness Hat-				*
field	II	1444*		
72-Individual Kellogg Package, Witness Tyler II	11.	1446*	* * *	
73-Mat, Used in Newspapers in Printing, Wit-				
ness Kolvoord II	I	1449*		* * *

^{*}Formal offer and admission of exhibit in evidence deleted in condensing record.

DESTRUCTION OF THE PARTY OF THE

E.	Ad	mitted	Pri	inted	
No.	Val	Page	Vol.	Page	
Manage Referring to Kellings Carton, Wit	-				
	. Ш	1454			
3-Small Individual Reliage Package, With			* * *		
- G	III	15204			
The Lating Indicated Parings, Witness Gray	III	15200	***		
To Pater of Malletts, Winess Lewis	TII	15240	***		
The Parkage of Madhetts, Witness Lewis	TII	15248	***	***	
75 Copy of Bal. Warmen's Reinel Corps Home.	441	1304-		* * *	
Wines Long	****	15260	***	***	
S Like Ning	777	1330*	10		
E-Sanded West Parker	777	1631	• • • •		
E Tanana Abertacaent, Martins Ferry,	111	1031	***	***	-
Was Asia Peny,	***	15000			
E-Law Ser Window Photograph Display,	. 111	1032*	Not pr	inted	
Wine And	***	1/200			
Market See Window Photograph Dis-	111	1033*			
Par Andrews Thompson Dis-					
25-Copy of Bid. Tabercular Sanitarium, Cres-	111	1633*	***	***	
Department of					
Final O	***	11444			
Be Care of Bet Species Kellogg's Whole	111	1041.	Not pr	inted	
Was Indicated Sanitarium,					
Course Pa. Winness Ander	***	1/101			
5-Care of Bat. Permayingana Soldiers' and	111	1042*	Not pri	inted	
Sales Home Witness Ander	777	1/494			
Fried Rings Wines Bell	T1	1042*	Not pri	nted	
to and W. Leberg Deal Price Carris, Witness	11	234	***	***	
The state of the s	111 .	17004		*	
95-Ross Carton, Waters Witherell	111 1	1730	***		
Some Long's Bire Book Price List,		1/04*	***		
Wines Books	111	1201+	NT	1	
Some Book,	141 1	1001-	Not pru	nted	
Was But Down	111 4	R01=	Niet .		
			NOT Pri	nted	
	Series 1				

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· DEPENDANT'S EXHIBITS-Continued.

Ex.	Adm	itted	Printed
	Vol.	Page	Vol. Page
94-Advertisement From Reading Eagle, Feb-			
ruary 4, 1932, Witness Miller	Ш	1841*	Not printed
95-Letters From National Biscuit Company			
to Jobbers, December 1, 1931, Witness		•	
Miller	III	1842*	IV 143
96 and 97-Two Circulars Carrying Advertise-			
ments of Kellogg's Whole Wheat Bis-			. 4
cuit, Witness Moyer	III	1850*	Not printed
98-Story Book of Games, Witness Hopkins	III	1863*	Not printed
99-Wheel of Knowledge Change Witness Hop-			* ,
kins	III	1863*	Not printed
100-A-File Copy of Standard Government			
Form of Bid, for Use by Navy Depart-			
ment, for Supply Department, U. S.			
Naval Air Station, Lakehurst, N. J.,			. *
Witness Hopkins	III	1866-	Not printed
100-B-Standard Government Form of Bid, by		5	
Navy Department, U. S. Navy Yard,			•
Washington, D. C., Witness Hopkins.	Ш	1866	Not printed
101-Standard Form of Bid, Dated January 12,			700
1933, U. S. Naval Air Station, Lake-			
hurst, N. J., Witness Hopkins	III	1866	Not printed
102-Federal Standard Stock Catalogue, N-C-		-	
191, Witness Hopkins	III	1868	Not printed
103-Small Kellogg Carton, Purchased on Din-			
ing Car, Northwestern Railroad	III	1944*	
104-Letter to the Kellogg Co. From the F. H.			
Cobb Co., Inc., Cortland, N. Y., Dated			
March 22, 1933, an Addendum to the			
Testimony of Mr. A. J. Twentyman	Ш	1952*	Not printed
105-Case Used for Packing National Shredded			
Wheat, Witness Sawyer	III	1957*	
106-Sketch, Diagram of Threads, Witness Ma-			,
lone, Made by Mr. Clarke	II	963	Not printed

^{*}Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS-Continued

0				
Ex.	Ad	mitted	1	Printed
No.	Val	Page	Ve	ol. Page
107-Sketch Diagram of Threads, Made by	1			
Witness Malone	II	963	No	t printed
rootstatic Copy of Ad in the Denver Re-				
publican, Dated March 11, 1894, Wit-				
ness Hurd	II	974	L	145
109 Certificate of Incorporation Colorado		4	-/4	
Shredded Wheat, January 25, 1895,		11.7		
Witness Hurd	II	977*	No	t printed
110-A and 110B-Government Bid, Fort Logan,	-			
Dated April 11, 1933, Witness Copeland	III	1989*	No	printed
111-Package of Egypt Stick Candy	III	1990		
112-Second Sheet, Page Five, Denver Times,	4			
March 17, 1894	III	1990	Not	printed
113-Second Sheet, Page Five, Denver Times,				,
March 10, 1894	HI	1990	Not	brinted
114-1 hird Sheet, Page Eight, Daily News, Den-				
ver, Colorado, July 17, 1895	III	1990	Not	printed
115-Fourth Sheet, Page Eight, Daily News,				P -111100
Denver, Colorado, July 14, 1895	III	1990	Not	printed
116-Fifth Sheet, Page Eight, Daily News, Den-				printed
ver; Colorado, July 27, 1895	III	1990	Not	printed
117-Sixth Sheet, Page Eight, Daily News,				
Denver, Colorado, July 7, 1895	III	1991	Not	printed.
118-Seventh Sheet, Page Eight, Daily News,				printed
Denver, Colorado, July 10, 1895	III	1991	Not	printed
119-Eighth Sheet, Page Eight, Daily News,				
Denver, Colorado, July 28, 1895	III	1991	Not	printed
120-Copy of Record in the Case of Shredded			5	,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,
Wheat vs. The Humphrey Cornell Co.				
and Frederick H. Towne, Witness Ross I	II	1992	Not r	rinted
121-Photostatic Certified Copy of Majority				micq
Opinion of the U. S. Circuit Court of				
· Appeals, Witness Ross I	II 1	1992	IV	147
122-Copy of Petition for Rehearing, Witness		-		
Ross I	II 1	993	IV	159
	- 1		**	137

^{*}Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANTS EXHIBITS-Continued.

Ex,	Admitted		Printed		
No.	Vol.	Page	Vol.	Page	
123-Kellogg Carton Used From About 1910 t			1		
1912, Witness Ross		1999*			
124-Kellogg Carton Used From 1913 to 1914 t	0*				
Some Time in 1915, Front Panel of	of				
Carton Entitled Kellogg's Toaste					
Wheat Biscuit, Witness Ross	·III	2000*			
125-Kellogg Carton Used From 1915 Until 191	8		1	= (
(About) or 1919, Front Face Read	s				
"Copyright 1910 by Kellogg's Toaste	d			- +	
Corn' Flakes Co.," Witness Ross	. III	2000*			
126-Certified Copy of Mandate, Witness Ros	s III	2005	IV	163	
127-Shredded Wheat Company Chart, "Educa			0		
tional Exhibit of Shredded Wheat Bis				2	
cuit"	. 4	288*	Not	printed	
128-Book of Labels Illustrative of Jordan Tes					
, timony		1002	Not	printed	
129-Book of 1929 Newspaper Advertising		1003	Not	printed	
129-A-Book of 1928 Newspaper Advertising		1003	Not	printed	
129-B-Book of 1929 Newspaper Advertising		1003	Not	printed	
129-C-Book of 1930 Newspaper Advertising		1004	Not	printed	
129-D-Book of 1931 Newspaper Advertising		1004		printed	
129-E-Book of 1932 Newspaper Advertising		1004 ^f	Not	printed	
130—Board Containing Samples of Defendant		. 1			
Cartons, Marked A to R		1006			
131-Holder Containing Kellogg Poster Adver					
tising Before Suit Brought		1016			
132—Packages Prepared by Witness Jordan		1016			
133—Form Letter to Newspapers Re Kellog					
Advertisements		1016	Not	printed	
134—Five Bundles of Retailer Advertisement of					
Kellogg's Whole Wheat Biscuit		1016	Nota	printed	
135—Bundle of Retailer Advertisements of Kel				,	
		1016	Not	printed	
logg's Shredded Wheat Biscuit	. 11	1010	1.01		

^{*}Formal offer and admission of exhibit in evidence deleted in condensing record.

come in, see the biscuit there, and say shredded wheat biscuit. They say that is the one they want. Both products are on the same shelves. They see them when they come in the store. They are both side by side. I do not think anybody ever picked up a package of Kellogg's Whole Wheat Biscuit for shredded wheat. I do not think there is any possibility for mistake.

I know where the shredded wheat are, and I have carried them a long time. People come and take them from the shelves, also. My experience before this store was across the ocean. I have been in this country five years in June. I have been with Loblaw all the time, always in Chicago. My customers can wander around the store at will. My customers know this article as shredded wheat. I really believe they now know the Kellogg product as shredded wheat, also. When they ask where the shredded wheat is, I just point out where it is on the shelf, so that, when they go there, they can take either one they want.

RE-DIRECT EXAMINATION.

THE WITNESS: Our store is one of a chain system of eighty-six, all in Chicago and suburbs. They are all of the same general type as mine. I think there is only one service store in the chain, the rest being self service. I do not know of any other self-service chain similar to ours in Chicago.

RE-CROSS-EXAMINATION.

The Witness: All items on the shelves carry price tags. Both kinds of shredded wheat sell for the same price. That has always been the case. We have had advertising displays of Kellogg's biscuit, but we have never had any special price on it. We never had any combination of two or three items with it. We simply sell the various Kellogg products per package. We never had any demonstrations or anything like that.

LEO KEIL.

Deposition taken at Chicago, Illinois, March 15, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am and have been in the retail grocery business about five and a half years. I am with the Loblaw Groceteria, Jewell Food Stores, Inc., a chain organization of eighty-five self-service stores, where the customer comes in, takes a basket, goes through the aisles, and picks out what she wants. There is a turnstile at the door. Purchases are wrapped up, the customer pays for them, leaves the basket, and that ends the transaction.

Our store handles Kellogg's Whole Wheat Biscuit. We have handled it around three months. We also handle Niagara shredded wheat. Those products are on the shelf. Occasionally we display one or the other of them, if it is advertised. There is no preference at all which we shall display; but, if Kellogg's is advertised, we usually display it in the window and the store. The same thing refers to National Biscuit. When I say advertised, I mean the chain does consumer advertising of the product in the newspapers. If the chain carries newspaper advertising of Kellogg's, that is usually put on display to fit in with the advertisement. That is also true of the Niagara shredded wheat. Of the two, we sell most of Kellogg's, averaging around two to one over the Niagara Falls biscuit. I attribute that to the smaller Kellogg's biscuit, being toasted on both sides. The housewife prefers a smaller biscuit in serving it to children. Also, the cellophane-front package is more attractive. I think the total sales of shredded wheat biscuit are being increased rather than decreased on either one.

CROSS-EXAMINATION.

The Witness: I do not also refer to Kellogg's when they ask for shredded wheat biscuit. Sometimes a customer comes in and asks for Kellogg's shredded wheat biscuit. Then I know what she wants. Occasionally, somebody will come in and ask for shredded wheat biscuit. If you refer them to the National, Niagara Falls biscuit, they will say: "Oh, no, I want that one which the Kellogg people put out." They regard Kellogg's as shredded wheat and ask for it in that way. Sometimes they ask for shredded wheat biscuit, and, when they pick it up, it comes to them they want Kellogg's Whole Wheat Biscuit. Those are the packages of Kellogg's that have the cellophane front with the biscuit showing through.

It is very natural for a customer who sees the cellophane front with the biscuit showing through to think it is shredded wheat. I have known the package, Plaintiff's Exhibit 1, for a long time. It is very well known in all grocery stores. I have worked in the A. & P. chain grocery service stores in Detroit. The store I now work in is one of the Jewell Tea stores. There are eighty-five of them. There are regularly two clerks besides myself, and we have an extra clerk on Saturday. Occasionally they assist the customers. We usually approach them and ask them if we can help them. Sometimes the customer will ask for assistance. We are there to help them if we can.

Our men occasionally assist customers in making sales of something they are not looking for. We carry milk or cream in our store. If we see a customer buying cereal, we suggest milk or cream to her. That is salesmanship. Our salesmen do not suggest one cereal as against another; but, if a woman buys milk, we will suggest and ask her if she has any cereal. We never suggest any particular item.

If a customer comes in and asks where the shredded wheat is, and we point it out, we do not, as a rule, attempt to offer Kellogg's Whole Wheat Biscuit or Shredded Wheat, one in preference to the other, because both are displayed alongside of each other. We usually refer them to the shelf, and they have their choice. There are occasions, once in a while, when we push one in preference to the other. It all depends on whether it is advertised. If the Kellogg Company is running some special advertisement of its Whole Wheat Biscuit, we just say it is being advertised at a special price, when there is some special price on it. As a rule, they are both sold in my store at the same price. To my mind, I think they are making a little more profit on the Kellogg biscuit, a little better break for the retailers.

When we give them a sales talk, we tell them there are fifteen biscuits to the package, the biscuit being toasted on both sides, and that it is a smaller biscuit than the Niagara Falls biscuit. It is necessary occasionally for us to make a comparison between the two in order to make a sale. I think the cellophane-front package has had a lot to do with Kellogg's Whole Wheat Biscuit outstripping the sales of shredded wheat biscuit in our store. It is also a more attractive package. It has quite a bit to do with it, and being more biscuit to a package, also. Occasionally our customers pick up a package and read what is printed on it. do not really think the expression on the end of Plaintiff's Exhibit No. 161: "A shredded wheat product," and, on the other end: "Shredded wheat in its most delicious form." would have any influence on a customer who examined it. I think that she would know that already by looking in the window. She would not think that it was something that had the sanction of the old Shredded Wheat Company, nothing of that sort.

Mr. Clark: At this point, I have an objection I would like to put on this record: and that is that there is no basis for Mr. Vilas' assumption that everybody in the country knows all about the old Shredded Wheat and that, therefore, it ought to be assumed—

Mr. VILAS: You have not had a witness yet who has not proved it. I cannot examine 120 million people, although I would be glad to.

Mr. CLARKE: There are customers who look through the cellophane front and say, "That is shredded wheat"; but that does not—

Mr. VILAS: You are testifying now.

Mr. CLARKE: I will ask the witness if that is not so.

THE WITNESS: Well, yes.

XQ. 68. There are not very many people who do not know what shredded wheat is, are there?

A. Well, it is very seldom you run across a person that does not.

RE-DIRECT EXAMINATION.

THE WITNESS: I have had experience with demonstrations of products in grocery stores. I have not had any personal experience with demonstration of either of these shredded wheat products.

HARRY HAMILTON.

Deposition taken at Chicago, Illinois, March 15, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am manager of the Jewell Food store located at 5038 West Madison Street, Chicago, one of about eighty-five chain stores, all the same type, self-service, where the customer goes through a turnstile, picks up a basket, selects what she wants, takes it, has it wrapped, leaves the basket and goes about her business.

We handle Kellogg's Whole Wheat Biscuit. I imagine I have handled it about nine months. I have known of it longer than that, personally, I imagine about one year. That product sells regularly in our

stores and has for the past nine months.

We also handle Niagara Falls Shredded Wheat. Both products are displayed in the stores. Kellogg's Whole Wheat Biscuit sells the most by a very great majority, four or five packages to one of the Niagara Falls. Those are sales all made on the self-service system, with no help from clerks at all. I attribute that predominance to the name Kellogg, for one thing, and the smaller size biscuit, and a much more attractive package, which goes a long way. Kellogg's has the most biscuit in the package. They are both displayed at the same price.

Once in a while the chain organization itself advertises Kellogg's biscuit to the consumers. I think they have done that once or twice. The Kellogg package I use has the cellophane front. That feature helps the sale of the Kellogg product quite a bit. I have heard quite a few favorable comments from customers about the cellophane front. They all liked it. It made

a very favorable impression on them.

CROSS-EXAMINATION.

THE WITNESS: They like to look through the package, and they like—I do not know just how to explain it, but it is like a Cadillac looking like an old model T Ford. I think the old shredded wheat package has no value. They just pass it up like that. They know what shredded wheat is, what is in the package. I

imagine we did about 50 per cent. of the job in increasing Kellogg's Whole Wheat Biscuit sales four to one as against shredded wheat, and the organization did the other 50 per cent. We had a little display in the window and a little display on one of the tables, and put a price ticket on it. Kellogg's Whole Wheat Biscuit is the same price to the customer as shredded wheat.

XQ. 41. What else did you do? How did you introduce it when it was new in your store, to your customer?

A. I put a display up near the checking desk, where the girl could get hold of the package and draw a customer's attention to it.

THE WITNESS: I would tell the girl to say it was a new product in the market, with smaller biscuit. If the customer would take and liked it, she could get it there all the time. I told her to say that to about 90 per cent. of my customers. I did not in particular induce customers who wanted shredded wheat biscuit to take Kellogg's biscuit. Some of the girls perhaps did, on some very rare occasions. I do not think there have been any cases of that. I would not swear to it. I have never had the occasion arise when a customer came to a turnstile with shredded wheat and we introduced Kellogg's to her. When a customer came out with shredded wheat, we were selling shredded wheat then. We never asked her to try Kellogg's Whole Wheat Biscuit. We just let her go by. When, however, a customer would come by who had not selected any cereal, I asked her to try Kellogg's Whole Wheat. I never asked a customer to try the Whole Wheat Biscuit when she had selected the shredded wheat. For a short period, about three days, we displayed it prominently and had it right by the checking desk, so we could get hold of it promptly when we wanted it.

Then we put it on our shelves, and we displayed it in the window maybe once every two months. I also displayed shredded wheat in the window. Shredded wheat is advertised in the newspapers. I have known that package for some time. I am twenty-four. I did not know shredded wheat before I went in business. I have not been a user of it. I do not eat shredded wheat at all. I do not like it.

RE-DIRECT EXAMINATION.

THE WITNESS: I had a sort of hazy idea what shredded wheat looked like, but I tried it once or twice. It was toasted too much, seemed like straw to me, so I did not use it.

LOUIS JAMES HOY.

Deposition taken at Chicago, Illinois, March 15, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a chain store manager of a Loblaw Store at 3920 Lawrence Avenue, one of a chain of eighty-five self-service stores. A few of them are coming in now as service stores, but most of them are self-service, where there is a turnstile and the customer comes in, helps herself, and checks out at the turnstile.

We handle Kellogg's Whole Wheat Biscuit. We have had it about a year. We also handle Niagara Falls shredded wheat. The Kellogg biscuit sells better, in a ratio of two to one. Those two products are displayed in the stores. We put them on the shelves. From time to time we give special displays, a display near the check-out desk and in other places. I would attribute the increase of the sale of the Kellogg product over the Niagara Falls product to the cellophane-

DEPENDANT'S EXHIBITS-Continued.

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ALEXANDER WILSON.

Deposition taken at Chicago, Illinois, March 15, 1933.

DIRECT EXAMINATION.

THE WITKESS: I am twenty-five and manager of a grocery store. I have been in the grocery business about nine years. I am at present manager of a self-service store, Loblaw Groceteria. There is a turnstile as you come in the door. The customer takes a basket and goes around the store helping herself. There are clerks around the floor also, to ask her if they can help her find anything. Then the customer checks out at the turnstile as she comes back out and pays for the purchases. They are wrapped up for her, and the basket goes back to the rack for use by another customer.

My store handles Kellogg's Whole Wheat Biscuit and has had it for more than six months, I am pretty sure. We also handle Niagara Falls shredded wheat. Both those products are displayed on the shelf. There is no preference of either one over the other. We regard both of them as being equally displayed. Our customers pick out whichever one they want. Kellogg's Whole Wheat Biscuit in our store sells at least three to one against shredded wheat. The packages are lying there, and I think Kellogg's biscuit is in a more attractive package, with the cellophane front, and they are smaller biscuit. I think that has a lot to do with it. The business continues. I have had customers come in and ask where they can be found. Some woman sends. her husband for it and some send their children. Some designate on the note: "Give the kids the small oiscuits."

CROSS-EXAMINATION.

THE WITNESS: I say that the package with the cellophane window in it, showing the biscuit, is one of the features which makes the Kellogg package sell. They

front box. Both the National and the Kellogg biscuit sell at the same price in our store. I think the cellophane-front box is responsible for the stimulation in sales. I put a large display in the window and got a big response. I have continued that window display from time to time.

CROSS-EXAMINATION.

The Witness: I have not put any special effort behind the Kellogg product, aside from the window and store displays from time to time. The window display was a pile of packages of Kellogg's biscuit, with the window side out or uppermost, showing the ends of the biscuit. I made no individual effort to show it to my customers. It was displayed on the shelf. Being a self-service, the people walk in and select their own merchandise. When it first came in a little more than a year ago, I do not remember having it near the checking stand to show to customers.

I have been connected with chain stores for more than twelve years, during which time I have known stredded wheat, and I recognize the package, Plaintiff's Exhibit 1, which is the old package that has been on the market so many years. People have always asked for that as shredded wheat. There is no other name that the public adopts when they ask for shredded wheat. When they do, I know that is what they mean, and that is exactly what they get. I have never given them Whole Wheat when they asked for shredded wheat. I have never made a special effort to distinguish between the two products. When people ask for assistance in my store, they receive it. If Kellogg is introducing a new product in my store, we make a window display of it, but we cannot leave it in the window more than three or four days. We have to change our windows frequently.

There was little interest in the Kellogg biscuit when it was first introduced on the market. People inquired for it and wanted to know what kind of product it was. The girls were instructed to try it, if they wanted to, so they could tell them what it was. I told them it was shredded wheat. That is what it is. It is something that fills the same requirements as the old shredded wheat. If a customer wants shredded wheat, she wants either that or this. They are both shredded wheat to me. They are both the same product made in the same way, and they look alike, but there is a little difference in the size, and it is double toasted. There is a difference in the color and a difference in the package, but the basis of it is shredded wheat, the same sort of products

I do not know why I say Kellogg's biscuit is shredded wheat, except that it is. This product now made by the National Biscuit but once made by the Shredded Wheat Company, has always been called shredded wheat. That is what the public asks for. I do not think of anything else, because I have been educated to the fact. There were special bulletins with our own advertising, calling it a shredded wheat product, which is what it says on the box.

XQ. 56. What I would like to get from you, if I can, is a definite statement as to why you call this shredded wheat. And I ask you if it is not because that is the only name you have ever known that pillow-shaped biscuit by, during all your life.

A. Well, I guess it is, when you come to think of it.

XQ. 57. There is no doubt about it, is there? A. No.

RE-DIRECT EXAMINATION.

THE WITNESS: I know what toasted Corn Flakes are. It is a pressed flake of corn, toasted. That would

be the only meaning I could get out of it. Shredded wheat, would mean I think, the same kind of product, made of a kernel of wheat processed differently, shredded instead of flaked. I know of no other way to describe that product than by the name shredded wheat or shredded whole wheat biscuit. I do not know of any other descriptive name I could give it.

Uneeda Biscuit is a white-flour cracker, or soda cracker. That would be a descriptive name for Uneeda Biscuit. I know of no other name for shredded wheat than shredded wheat or shredded whole wheat biscuit.

RE-CROSS-EXAMINATION.

The Witness: The name shredded wheat biscuit is descriptive of the biscuit. I do not know what shredded means. I have never been a farmer. I do not know what a corn shredder is. I am a city man. I do not know what it is to shred corn. I can imagine what it would do, but I have never seen it. I do not know how this wheat is made into what I call shreds. To my knowledge, the only way it could be made would be to be pressed out long and to be shredded with a shredding machine. I see these long strings. I would not think that pressing the wheat berry out into a long string like that constitutes shredding.

RE-DIRECT EXAMINATION.

THE WITNESS: I have never eaten Triscuit. I have sold a lot of them. I do not know what the product is. The description from the package: "Uneeda Bakers Triscuit, 100% whole wheat cracker, made of shredded whole wheat," would not give me any idea of what it was. I would say it was whole wheat toasted in biscuit form, whole shredded wheat.

MRS. BEULAH E. WILLIAMS.

Deposition taken at Chicago, Illinois, March 15, 1933.

DIRECT EXAMINATION.

these Kellogg's biscuits that I bought from a Loblaw store. I first received a card, telling me that I could purchase one box and get one box free, and I bought them at the Loblaw store. Then a gentleman called on me, asked me questions about the biscuit, how I liked it and so on. I said I was very well pleased with them. He came back a second time and asked me if I would come down here today and tell about how I liked the biscuit. I never saw the man before he came to my house.

The coupon card was one something like the one you show me, only it was from the Loblaw store. The substance of the matter on the card was that, by buying one box at the store, I would get one box free. I had seen Kellogg's biscuit before in the Loblaw store. My attention was attracted to it at that time on account of the glassine front, where I could see what kind of biscuit I was buying. I liked the looks of it much better than shradded wheat biscuit. The Loblaw store was a self-service store. I took the Kellogg biscuit in preference to the National shredded wheat; and my preference was because I had purchased a box like Plaintiff's Exhibit No. 1 sometime ago and found them wormy. I have two children, and it was not very pleasing. I never bought any more shredded wheat biscuit until I saw the ends of this biscuit. I did not pay much attention to whether it was National or Kellogg's. I just knew they were nice looking biscuits and toasted much better. Now that I know them, I like them a whole lot better, because they seem to be more crisp. The children will eat all of a Kellogg biscuit, and I can give them another biscuit if they want more. They

used to leave part of the shredded wheat.

I have continued buying the Kellogg biscuit. I have not bought any of the Niagara biscuit, like Plaintiff's Exhibit No. 1 any more. I lost my confidence in them. When you have children to feed, and you find little cobwebby worms on the inside of the package, it is not very appetizing. I buy Kellogg's Whole Wheat Biscuit. It is nice and fresh. That is why I was willing to come down here today. I noticed the difference in color. They are much more golden brown and much more appetizing to me than the Niagara Falls biscuit. In buying them, I wait on myself in these self-service stores. I think it is a wonderful idea to send out a card like that, because, up to the time I bought the Kellogg biscuit, I never knew there was anything different, except Plaintiff's Exhibit 1.

CROSS-EXAMINATION.

THE WITNESS: I had seen Kellogg's Whole Wheat in the store. If Kellogg's kept it a secret that they were making the biscuit, it would not do them much good or the public. Before I bought the Kellogg biscuit, I had not used the shredded wheat for quite some time. I had, however, been buying it off and on for many years. I have two children, the boy is eleven years old. I had been buying shredded wheat off and on for them for many years. I do not recall using it before I was married. I had not encountered a wormy package of shredded wheat until that time, but I had a terrible time making the children eat them. They were more than they wanted to eat and did not seem appetizing to them. I put them in the oven or poured boiling water on them to make them softer or more appetizing. Until the time I found the package wormy,

I had not had that experience before. Then I was off of shredded wheat, until I had this opportunity to get Kellogg's biscuit. Since then, I have been buying Kellogg's, and I will continue to buy them. I had bought the Kellogg's biscuit before I got this card. I went into the store and was attracted to it by the glassine front. I saw the biscuit inside was different, although I did not pay much attention to what kind it was. The salesmen in the store said nothing to me about it. I just walked in and took them home and tried them, because they were so much better looking than the other biscuit. I thought if I tried a package like Plaintiff's Exhibit 1, I would get them wormy again, but if I got a package of Kellogg's, I could see they were fresh.

MRS. LEAH WALTERS.

Deposition taken at Chicago, Illinois, March 15, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife. I bought some Kellogg's biscuit, and I liked them so well, because it is so much easier to serve than the old shredded wheat biscuit. A man came to my house. I did not know who it was. He asked me how I liked the biscuit, and I told him I liked it much better than shredded wheat biscuit, that I knew it was not the old shredded wheat biscuit and I liked it so much better because they were easier to serve and so much crisper. He was talking about Kellogg's Whole Wheat Biscuit.

I first saw the Kellogg biscuit in Loblaw's, with this new glassine window, and it looked nice and crisp to me. The size of it took my eye. I bought several packages. Then they said if you buy one you would get a free one, and they sent a postal card, like Defendant's Exhibit 64, which you show me. I bought that and got a free one. I have several men staying with me, and they liked them so much better than the old ones they asked me where I got them. They are smaller, easier to serve, and much crisper. They take a different kind of plate, and you do not use anywhere near the cream that you do with the other dish, which means a whole lot when you have men staying with you.

I just met Mr. Clarke a few minutes ago. I had no conversation with him other than what he has just asked me, as to how I first became acquainted with the Kellogg biscuit, just a two or three-minute con-

versation.

CROSS-EXAMINATION.

THE WITNESS: Seeing the biscuit through the cellophane window certainly attracted me. Before that I did use shredded wheat biscuit, but I never cared about it, because it was not as crisp.

I have people boarding with me, two brothers that stay with me. I serve them with cereal for breakfast. They have been with me two years. I have been buying shredded wheat biscuit like Plaintiff's Exhibit 1, off and on. When I came home with this other one, they liked it very much better. It certainly took my eye, the Kellogg biscuit. I had known shredded wheat many, many years. It is an old product. Shredded wheat is like a household word to me. It has such a terrible color, and it has not the same crispness as the Kellogy biscuit has. It is just a darned big thing. You have really to put it in a soup plate and a lot of cream on it. You can put the Kellogg biscuit on a cereal dish and put fruit in between. With the Kellogg biscuit I save quite a bill on milk and cream. It is a less expensive product to serve. It is much better to see it on the table in a smaller dish.

RE-DIRECT EXAMINATION.

THE WITNESS: My boarders like it better. I would not go back to the shredded wheat biscuit. I have bought it at a self-service store each time, and waited on myself, in Loblaw's.

CLAYTON LOUIS KOLVOORD!

Deposition taken at Chicago, Illinois, March 15, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am the merchandise manager for the Kellogg Sales Company out of the Chicago office, covering Illinois and Wisconsin. I am twenty-five years old. I have been with the Kellogg Sales Company since my graduation in the summer of 1930. I have traveled. When I started with the Kellogg Company, I was at Rockford, Illinois, and traveled through Wisconsin, with headquarters at Rockford. I was then transferred to the Chicago office, where I have been about a year.

I have knowledge of the facts concerning the distribution of Kellogg Whole Wheat Biscuit in this Chicago territory, embracing most of Illinois, having worked with all of our principal men, and Wisconsin. I am familiar with the methods by which Kellogg's Whole Wheat Biscuit has been introduced to the trade and to the consumer in this district. In Chicago, we have used coupon cards, mailed to customers of various stores, telling them that they may take the coupon into the store and purchase a package of Kellogg's Whole Wheat Biscuit and will be given another regular-sized package free, like Defendant's Exhibit 64. I have used those with Clover Farm Stores and with Loblaw, another voluntary chain, all owned by the

Jewell Tea Company. It is a straight chain, under

one ownership.

We used the cards on Loblaw's. Within three months time, we merchandised seven hundred cases of Kellogg's Whole Wheat Biscuit. Loblaw stores are self-service, where the consumers help themselves. They had floor displays and also the window display on the front, with a white poster with red letters picturing Kellogg's Whole Wheat Biscuit, featured at ten cents a package. They moved a great many, and they have featured our biscuits from time to time.

That method of merchandising has been used in other stores in our territory. We find display, the point-of-purchase merchandising very effective in selling the biscuit. People frequently come into a store and take the goods off the display, as they would from any other display, handing it to the clerk and paying him. It is a very effective method of introducing the merchandise to new consumers.

We have had a forty-inch newspaper mat featuring Kellogg's Whole Wheat Biscuit. We have a newspaper run it and ask the grocer to tie in to it of their own free volition. They have no advertising allowance with Kellogg; and they have featured Kellogg's Whole Wheat Biscuit and tied in with advertising in that town. The Kellogg Company carried the expense of the newspaper advertising, and the dealers tied into it by, featuring store displays, also by using the Kellogg cuts in the newspaper copy for that night's issue.

We work practically all the towns in Illinois and Wisconsin on a house-to-house campaign, whereby we introduce Kellogg's Whole Wheat Biscuit to the consumer, who purchases two packages of Kellogg's Whole Wheat Biscuit and receives a package free, a very effective merchandising plan.

I personally supervise the crew. The men go from house to house, knock and introduce to the lady a pack-

age of Kellogg's Whole Wheat Biscuit, tell her that it is a biscuit smaller in size than the regular National Biscuit shredded wheat, toasted on both sides, and that they will sell two packages and give one package free. The lady would buy the two packages at the door when we were successful in interesting them, and get the third package. The grocer always received the profit on that. The goods were sold to him, and the merchandise sold to the consumer was all bought at the store, so that every package sold was just exactly as if the grocer had sold it out of the store. He would receive the repeat business, and that was very good.

I would say we have approximately seventy-five per cent. distribution of Kellogg's Whole Wheat Biscuit in our district, Illinois and Wisconsin, meaning that, out of about one hundred stores, approximately

seventy-five carry the Kellogg product.

We have used various methods of window displays, including a large jumbo package featuring Kellogg's biscuit, with ribbons to display the feature, fifteen biscuits, double toasted, top and bottom; finer shreds, and so forth; whereby we have gone into towns and made window displays in the retail stores. The display we have before us with the jumbo carton, Defendant's Exhibit 65, is a typical window display of the Kellogg Company and one we have used. It is used in windows about as it is set up here, with the jumbo carton of Kellogg's biscuit at the top, and, under that, the picture of the saucer with two biscuit; and under that, the words "Whole Wheat Biscuit," and six ribbons running to six little legend cards:

- 1. Certified for food value by Medical Arts Daboratory, Philadelphia, Pennsylvania.
 - 2. Convenient size. Fits the bowl. Kellogg's.
- 3. Six vitamins: A, B, C, D, E and G are present, when served with milk and cream. Kellogg's.

1406 Deposition of Clayton Louis Kolvoord

- 4. Double toasted, top and bottom.
- 5. Finer shreds and finer flavor.
- You get fifteen biscuit in each carton.
 That is the way the display has been used in our district.

We also have a great deal of restaurant advertising material used to bring the attention of the consumer to the Kellogg biscuit. At my hand is a diaplay used in restaurants, whereby the individual package of Kellogg biscuit is placed into the grooves and set up on the counter or ledge, where it is in plain view and sight of the consumer or purchaser. This piece of material, Defendant's Exhibit No. 66, has a picture of a saucer with two biscuit, and a banana on the biscuit. Under that, the words: "Try this new Kellogg's Whole Wheat Biscuit with bananas." The little stand above the picture of the plate is used to place a package of Kellogg's biscuit on, an individual package which sets right in there.

We have also this other counter display, folding, which sets upon the grocer's counter, with a full-sized package of fifteen biscuits placed on the stand. These displays, like Defendant's Exhibit 67, have been distributed through our district.

The reading matter on the front is: "Toasted both top and bottom; convenient size, fits the bowl; new size, new flavor, new process, made by Kellogg's in Battle Creek."

We have approximately a ninety-per cent. distribution of Kellogg's biscuit in restaurants, in the individual carton. We have what we call an A. O.-5, which is made up of individual size, Kellogg's Rice Krispies, Whole Wheat Biscuit, Pep, and All-Bran, which the restaurants purchase. We also have the individuals which they purchase from their jobbers. Larger restaurants buy five or ten cases of Kellogg's

Whole Wheat Biscuit individuals, such as Thompson's restaurant in Chicago, handling Kellogg's cereals, where they buy a larger volume. A smaller restaurant

buys an assorted package.

I do not know of any methods of creating consumer demand which the Kellogg Company might use on its Whole Wheat Biscuit which we have not used in this territory. I think it is fair to say that the Kellogg Company has used all the standard and best-known methods of bringing that product to the attention of consumers, such methods as advertising, displays, house-to-house canvassing, the coupon device, and newspaper advertising. Those methods have been followed up by advertising by retailers and other dealers, because it has created a consumer demand, and the retailers today are featuring Kellogg's Whole Wheat Biscuit in their advertising copy, paid for by the retailer. There is no advertising allowance made by the Kellogg Company.

CROSS-EXAMINATION.

The Witness: Retailers feature Kellogg's Whole Wheat Biscuit by various means. They have a large mass floor display, whereby they build two or three cases of Kellogg's Whole Wheat Biscuit into a display, placed naturally at an advantageous place in the store where the customer sees it when she comes in. In some stores, the cellophane packages have been used. In other stores, the packages are like Plaintiff's Exhibit No. 161, except that it has a picture of a dish on both main panels. At the present time, that package, without the window, has been used more extensively in our territory. The package with the cellophane window is generally sold in the Chicago territory and many jobbers specify it.

We and our company have made a very extensive campaign over a period in the last few years to intro-

duce this Whole Wheat Biscuit. I have been familiar with it since 1930, and the campaign has been going on since then. I have been engaged in that line of work for the Kellogg Company since I came out of college. In my first summer I handled a crew selling biscuit from house to house in the City of Elgin and in the City of Rockford. At that time they sold two packages and gave one package free. That practice has been used in this territory and in Wisconsin. Kellogg's Whole Wheat Biscuit is a product that competes particularly with shredded wheat. The kind of trade and the demand that is filled by that product is the same sort of trade and the same sort of demand met by shredded wheat, the same consumers and the same want. That is, they want this same biscuit baked in this peculiar way, except that some people like our biscuit better, because it is toasted on both sides.

Our biscuit has certain features dwelt upon in Defendant's Exhibit No. 65, such as more biscuit in the package, and toasted browner on both sides. are the points we stress in introducing this biscuit to our retailers. In doing that, we have, of necessity, to compare it with shredded wheat. That is, we could not say it was more brownly toasted unless we said what it was we compared it with. We tell them it is a biscuit made of whole wheat that has been cooked and shredded and put up in biscuit form. We sometimes tell them it is shredded wheat. I regard it as shredded wheat, because it is made out of whole wheat, cooked and shredded and put up in biscuit form, and baked. In other words, it is made by a process similar in its essentals to the process by which shredded wheat biscuit has been made, and naturally produces a similar product, with the differences I have stated, which I think makes an improved product.

We are a competitor of shredded wheat, and our product fills the same want that shredded wheat does. I do not think a design to compete with shredded wheat was the motive in manufacturing this biscuit, but to make a biscuit that the consumer would buy and use. The biscuit was not put on the market with the motive of making a shredded wheat competitive brand. We are putting the biscuit on the market to try to make as good and better a biscuit than they had. We have tried to have a consumer demand for our biscuit. Shredded wheat has been on the market for some time. I knew it before I was in business, when I was a child. Shredded wheat had an extensive distribution as a cereal at that time and still has. I understand that Kellogg's Whole Wheat Biscuit is put out to be a better biscuit than shredded wheat and to occupy some of the same field as shredded wheat.

The names of consumers to whom we send postal cards, like Defendant's Exhibit 64, were submitted to us by the store managers. They made up the mailing lists. We mailed out probably twenty thousand cards in the City of Chicago. We have made tabulations of returns. Loblaw's is a good illustration. They have eighty-five stores, and we sent out fifty cards per store. That figures forty-five hundred approximately. We sold seven hundred and eleven cases of biscuits, twenty-four's.

We got a great deal of co-operation from those stores in this campaign and from others, such as the Clover Farm Stores. They co-operate with us and accept our displays, our large carton displays. We have men around Chicago whose entire duty is to make

store displays, just as any organization has.

When I directed this house-to-house campaign in Elgin and other places, I found it universally accepted by the housewife. We found very few women who did not like to be bothered with that sort of thing. Most of the housewives wanted to buy two packages and get one package free. That was an inducement to buy the

product. We found some that had not even tried our biscuit. Naturally, every housewife is interested in

using new products.

My statement that we have a ninety per cent. distribution in restaurants would cover approximately fifteen thousand in the States of Illinois and Wisconsin. I wish to be understood as saying that, in my estimation, ninety per cent. of them carry and sell Kellogg's biscuit. That is an estimate on my part. I have no figures here. I have worked the restaurants in a great majority of the territory. Approximately seventy-five per cent. of the restaurant owners have used, at one time or other, the display stand like Defendant's Exhibit 66. They like it because it is neat and attractive. Those displays are furnished us by our advertisng department at Battle Creek, not devised by us here.

Referring to the jumbo carton. Defendant's Exhibit 65, containing a list of products of the Kellogg Company, that package is approximately a duplication of this Kellogg Whole Wheat package. It is a facsimile of the present package without the window. I have not examined the printed matter on the end of the jumbo package very closely. Having looked at it more closely, I can now tell you that on the end of the jumbo package are listed the products, corn flakes. Pep. Krumbles, All-Bran, shredded whole wheat biscuit, Kaffee Hag, and Rice Krispies, all Kellogg products. Our own men say that our biscuit is a biscuit made ont of whole wheat that has been cooked and shredded and put up in biscuit form and toasted on top and bottom. They say it is a shredded wheat biscuit, which it is, and they do call it shredded wheat biscuit, because it is a shredded wheat biscuit. That is my opinion. Some of the consuming public call it Kellogg's Whole Wheat Biscuit. If they specify Kellogg's, they want. Kellogg's. I have found from my experience in traveling around with various men, that the retailers usually say Kellogg's Whole Wheat Biscuit.

I see the copy of the Winona Republican Herald, dated January 20, 1933, which you show me, Plaintiff's Exhibit No. 197, containing an advertisement by Paul Haake & Company. They have listed in there Kellogg's items, under the Kellogg Saturday sale: "shredded wheat, two packages for nineteen cents. Geography chart free." Generally, they specify the name Kellogg's Shredded Whole Wheat Biscuit. Very few ads are run like that. The trade name is usually put in there. In all the advertising copy I ever wrote for a lot of papers, we have always inserted Kellogg's Whole Wheat Biscuit," or "Kellogg's Rice Krispies."

RE-DIRECT EXAMINATION.

THE WITNESS: The Kellogg Company had nothing to do with this ad in Plaintiff's Exhibit No. 197. The grocer writes his own copy and turns it into the paper in which the ad appears. The Kellogg Company does not make the ad up.

I have heard of cases where they used the words "shredded wheat biscuit" and the National Biscuit Company salesmen have gone after printing men or grocery men who used it. They ask the grocer to feature the name when they advertise their products. They suggest to the grocer to feature it as their trade name.

At the present time, the Kellogg Company features the name Whole Wheat Biscuit, and has done so, as far as I know, for the last two and a half years, about. There has been no effort in that time to feature the name Kellogg's shredded wheat. The company's policy, as far as I can see, is that they are advertising a distinct and separate product, so there can absolutely be no mistake in the housewife's mind between our

package and the shredded wheat package. The National Biscuit Company advertise it as shredded wheat, and the Kellogg Company advertise it as Kellogg's Whole Wheat Biscuit. I have not seen any advertisements in the last two and a half years in which Kellogg have referred to it as shredded wheat or Kellogg's shredded wheat. All our mats are made with Kellogg's Whole Wheat Biscuit, all our newspaper ads and everything.

Only one incident I can recall is a forty-inch mat we ran in Harvard, Illinois, with a tie-up. The National Biscuit man there suggested to the grocer that they feature in that copy shredded wheat. The grocer showed the copy to me and I told him to change it to Kellogg's Whole Wheat Biscuit, it being a Kelloggday sale, which he did do. The National Biscuit men tried to get the grocer to feature in a special Kelloggday sale ad, the Kellogg's Whole Wheat product as Kellogg's shredded wheat. We were having a tie up in that town, and the nine grocers there were featuring Kellogg's Whole Wheat Biscuit that day. The National Biscuit cookie man suggested that they feature it as shredded wheat biscuit on the Kellogg tie up. The grocer showed me the copy, which we changed to read Kellogg's Whole Wheat Biscuit before it was submitted to his newspaper. I do not know the name of the National Biscuit man.

Wherever we have had tie-ups with the grocers. the National Biscuit people have tried to get in on these double-truck tie-ups, and feature their Shredded Wheat on this Kellogg-day sale, in various towns.

Displays in self-service stores and others of Kellogg's Whole Wheat Biscuit is a very common form of merchandising in the grocery trade today. Mass displays, floor displays are very effective merchandisng methods of bringing goods to the attention of both new and old consumers.

Of all the methods I have outlined, I think the point-of-sale merchandising in the store is most effective, with the large mass floor display, where the consumer actually comes right to the biscuit. It may be placed where she walks by it or in the aisle where she would walk into it. She sees it, looks the package over, and purchases it.

Naturally, the Kellogg Company encourages the sale of our biscuit in restaurants in the individual cartons, because practically all restaurants serve individuals. It tries to increase the individuals in the restaurant trade. As far as I know that is also true with regard to the Niagara Shredded Wheat by the National Biscuit Company.

I know of nothing that either the Kellogg Company or the National Biscuit Company could do further to increase the use of individual cartons in the restaurant and hotel trade that they do not do. They are well displayed. I do not think of anything else they could do. I cannot think of any expedient or device that the Kellogg Company has not already used that might help to increase the sales of its individual cartons in the restaurant and hotel trade.

RE-CROSS-EXAMINATION.

The Witness: Regarding the occurrence in Harvard, Illinois, I said the National Biscuit Company salesman tried to feature his own product on a Kelloggday sale at that time. I was there, conducting the sale. The National Biscuit Company salesman followed me. I was in the store when he was there. I found out about it after I came back. The grocer showed me the copy and told me that was what the National Biscuit Company man wanted him to do. That is the source of my knowledge.

RE-DIRECT EXAMINATION.

Was a special Kellogg-day sale, with the grocers on a double page, as we call it a double-truck, with a heading: "Special Kellogg-day sale," and then all the grocers featured in with the Kellogg products. I found the National Biscuit man had been there ahead of me. When I came back, I asked the grocer if he had turned in his copy and he showed it to me, with that ad, reading "Kellogg's" at the top. It listed shredded wheat. It was not our product, but it was listed among our products on that double-truck page. I told him that was a Kellogg-day sale and I would like to have all the Kellogg items mentioned. He changed it to read Kellogg's Whole Wheat Biscuit and turned it in to the printer.

RE-CROSS-EXAMINATION.

THE WITNESS: I saw the National Biscuit Company salesman, because he was right behind me. I did not hear him talk to the grocery man. I was not there. I have heard that that happened in other places in my territory. The grocers have told me it, and in traveling with our various men in various territories, they have also told me that. I learned it from my various customers and my various salesmen.

RE-DIRECT EXAMINATION.

THE WITNESS: I conduct my business in the territory on the strength of those reports and accept them as the facts on which I based the conduct of my business in that territory, because that man is in that territory and knows what is going on. There would be no incentive for him to lie.

RE-CROSS-EXAMINATION.

THE WITNESS: Referring Plaintiff's Exhibit No. 197, the page immediately adjacent to the Haake Store

advertisement is a Kellogg ad with the heading: "Veterans of Foreign Wars Sponsor Sales of Kellogg products tomorrow." That is what I had in mind when I referred to that. The Haake advertisement is a part of the Veterans of Foreign Wars ad, right at the top of that ad. We were talking about the tie-ups of the Kellogg Company, and this tie-up had been sponsored by the Veterans of Foreign Wars.

We give cuts like the illustration of a Kellogg package on page seven, to the grocer. He supplies them with the copy to the newspaper men, and they run them.

I do not know the Decatur Home Stores in Decatur, Illinois. I have not worked that particular town lately.

Looking at the sheet marked Plaintiff's Exhibit 198, purporting to have been a newspaper advertisement of the Decatur Home Stores, with an advertisement of the Kellogg's Shredded Wheat, that cut is one furnished by the Kellogg Company.

I do not know the Capitol Grocery Company of Streeter, Illinois. I do not work Streeter. Another Kellogg man who lives there works that town. I do not know personally the Capitol Grocery Company with headquarters in Springfield, Illinois. The cut shown on the Kellogg package pictured on the mailing folder, Plaintiff's Exhibit 199, bearing date through November 26, 1932, is an old-style Kellogg cut, furnished by the Kellogg Company.

We try to have our men have the latest cuts. Once in a while a newspaper has files and keeps old cuts that various manufacturers put in. It may be an old-style cut. I cannot give you any possible estimate of how many old-style cuts featuring Kellogg's Whole Wheat Biscuit are now in existence, because most newspapers clean up their old files every year. There probably are a few remaining out in the territory, in the smaller towns.

(The portion of the Winona Republican Herald not offered by Mr. Vilas was offered in evidence by Mr. Clarke and was received and marked "Defendant's Exhibit No. 68.")

RE-DIRECT EXAMINATION.

THE WITNESS: Referring to Defendant's Exhibit 68, the Winona Minnesota Herald, advertisement of Jefferson Grocery, two packages Kellogg's Whole Wheat Biscuit twenty-two cents, that advertisement

was paid for by the Jefferson Grocery.

Referring to the advertisement on page seven, "V. F. W. Sponsors selling Kellogg Products tomorrow," the mat is paid for by the Kellogg Company. In the next Consumers Market box, Kellogg's box, Kellogg's Whole Wheat Biscuit, and so forth, the sponsors are mentioned at the bottom of the ad. That ad was paid for by the Consumers Market.

Kellogg's day is where we go into a town, secure the cooperation of all the retail merchants in that town to feature Kellogg cereals for the one day, which is the reason for calling it Kellogg's day. They display them in their store and feature them in their advertising. We call it a Kellogg day. We have had a great many of these ads in different parts of our district.

CLYDE E. CHAPELLE.

Deposition taken at Milwaukee, Wisconsin, March 16, 1933.

DIRECT EXAMINATION,

THE WITNESS: I am a buyer for E. R. Godfrey & Sons Company, wholesale grocers. 'I have been buying for twelve years. I have been with Godfrey in the wholesale grocery business eighteen years. Before

them I was with John Altman. I think I have been twenty-one years all told in the wholesale grocery business. My father was in the retail grocery business. I have never been in it.

E. R. Godfrey & Sons Company sponsor a voluntary chain of stores, the Independent Grocers Alliance, with, I believe, three hundred and seven active stores today, located in central Wisconsin, from twenty miles north of Dubuque to the Kickapoo Bayou on the west, and as far north as Rhinelander, and up to the North Shore, to the edge of the Wisconsin Peninsula or Sturgeon Bay. We sponsor them, servicing them as wholesalers, and acting as a supply depot for them. We service other stores, outside that chain. We have perhaps a thousand other accounts on our books, as a guess. We do service other grocers, but no other chain.

Our organization handles Kellogg's Whole Wheat Biscuit. I believe we have carried it about two and a half years. We service that product to our retailer customers. We handle no other whole wheat biscuit or shredded wheat biscuit products besides Kellogg's. We do not handle the Niagara Falls shredded wheat of the National Biscuit Company, and we have not handled it since we handled Kellogg's biscuit.

We have never, to my knowledge, had a retailer customer return any Kellogg products to us and say it was not what he wanted. We have no mixups in the orders, to my knowledge.

We sell Kellogg's Whole Wheat Biscuit to most of our retailer customers. There is a continuing general demand for it in our house from our retailers. I call on the stores, and I have seen displays of Kellogg's biscuit. I cannot recall having been in a store when a customer was purchasing a package. I know of my own knowledge that our retailers buy this for the purpose of putting it on sale in their stores.

Our instructions go to the stores as to bringing to the attention of the general public Kellogg's Whole Wheat Biscuit. I think I can state those instructions are carried out quite well. We have our sales plan set up with advertising every week. We place an item like Kellogg's biscuit on sale, and the merchant gets a notice of the item. I brought one example of that along. Our contract with the retailer when he joins our voluntary chain states there will be so many items placed on a window poster. We also state in our contract that we will furnish a blue-print or cut of his window display. We also emphasize the fact that he must have inside store displays on the items that are advertised. I know these instructions have been carried out very well by most of the stores. They would build a window display and an inside store display on the items advertised. Kellogg's biscuit have been featured in those sales. We believe that cereals such as Whole Wheat Biscuit sell more rapidly in the spring than in the colder months. We feature them more often from now through the summer than at other times. The advance sales notice, Defendant's Exhibits 69-A and 69-B, is an . advance notice of sales that will go out on the date specified. The memorandum is dated March 13, 1933, when it was gotten out in advance. The notice is that it is to be on sale at such and such a time, beginning and ending on a Friday.

I regard the methods I have outlined as very effective methods of introducing a new article like Kellogg's biscuit to the attention of consumers in the retail chain we service. I think demonstration in a store would be possibly more effective. I do not know of my own knowledge whether the Kellogg Company has ever used any demonstrations in any of those stores.

I would say that Kellogg's Whole Wheat Biscuit is toasted shredded wheat. That is the way it looks to me.

We have done our utmost to make the I. G. A. stores modern. They are not exactly self-service. We do specify open shelving to invite the consumers to help themselves to the merchandise. They are free to do that. We do not use a check-out system, such as a strictly self-service store does. We arrange for sales work in those stores by either the owner or his clerks. This market has been a very backward one for a modern check-out system until very recently. The Piggly-Wiggly self-service stores were in Milwaukee at one time with a check-out counter. It was very difficult for us to get people to go and select their own merchandise. You almost had to hand them a basket and tell them to go and get the stuff. In the last year or so people have been more anxious to help themselves than before. We have tried to make our stores answer both purposes. The self-service feature has been meeting less resistance than formerly.

When Kellogg's Whole Wheat Biscuit is mentioned on the sales notice, the grocer is required to give it window display and also a store display. We have little tables in the stores where the sale items are displayed on the inside, with the price marked on display. Some stores make more extensive or more massive display than others. By window display I mean packages with the price on display in the window, conforming to the price advertised in the sales in the newspaper advertising, hand-bill advertising, and window posters. In this case, that advertising would refer to Kellogg's Whole Wheat Biscuit, with the price.

We do not handle Kellogg's biscuit in the individual cartons and do not service the hotel and restaurant trade. In this territory, that trade is serviced by a different type of jobber. One jobber here specializes on hotel and institution trade. I also know some firms in Chicago who specialize pretty much in institution business. It requires a considerably different set-

up than the grocery business, different lines of merchandise, number tens in canned goods, and so forth. It requires the carrying of practically two stocks. Our organization does not handle Kellogg's biscuit in the small individual size.

CROSS-EXAMINATION.

THE WITNESS: The symbols on Defendant's Exhibit 69 indicate the percentage of gross profit the dealer will make on the item. It is a little difficult for the retail grocers. They do not figure as closely as they should, and we try to do as much of that for them as we can. That is part of our service. On the other side of the exhibit, three letters opposite the line represent cost to him per case in code. The symbols on the left-hand margin are code for the gross profit and on the other margin the cost to him per case. For instance, on the item of Kellogg's Whole-Wheat Biscuit, twentyfour packages per case, we show on the right-hand margin that he will sell them at ten cents a package and on the left-hand margin the gross profit. That is true all through the exhibit. I do not mean to be understood as testifying that our stores do not carry any shredded wheat. I said we do not carry it. There is nothing in our contract with the grocers preventing them from carrying anything like shredded wheat. I believe some of them do carry it. I would not make the statement that we do not purchase either shredded wheat or anything else from the National Biscuit Company. If our salesman should take an order for shredded wheat, we would pick it up either from the National or some other jobber.

When a salesman does take an order for shredded wheat, we absolutely know what he means by it. We know that means the biscuit made by the National Biscuit Company. Our price book would show you exactly. The items are all set up in code numbers. If a sales-

man wanted a case of shredded wheat, he would write in for that case of shredded wheat for a certain customer. If he wanted Kellogg's Whole Wheat Biscuit, it would come in according to number, not by name. Shredded wheat is not coded in our book. We do not carry it in our stock. The Kellogg biscuit is number 12093 in the code. That would be so many cases of that number. If he got a customer who wanted shredded wheat, he would take his order in so many words. He has no number in our code for that.

We do not carry National Biscuit shredded wheat or any of their line of cookies and crackers. The chain consists of stores owned by independent retailers, most of them service stores. A majority of them are on a cash basis. I think there are very few of them deliver. Some of them still run an old-fashioned service store. They still call for that service.

I have known the package of shredded wheat, Plaintiff's Exhibit No. 1, for a long time. I have not seen it for a great many years. I have known it as shredded wheat. I would think that is what anyone else would call it. If you asked me to describe Kellogg's Whole Wheat Biscuit, I would not know how else to describe it but as a shredded wheat biscuit. I do not know whether that is because I have known this shredded wheat biscuit for so many years the only item of its kind on the market, and always known it by that name. If Kellogg's wheat were chipped, I do not think it would appeal to me as shredded.

Shredded, to me means about the way that wheat looks, not in biscuit form, you understand, but in long strips. If it were in long wavy shreds, it would seem to me that it would be a shred or string, like shredded coconut or shredded soap. Shredded to me means a long narrow shred, like a long string. It does not appear to me that it is something that is cut off or torn.

I know the expression in Gilbert & Sullivan's opera, "The Mikado": "A thing of shreds and patches." Shredded clothes it seems to me would possibly be where the yarn was hanging down. I have seen a corn shredder. It cuts up the corn stalk.

I do not know the process by which shredded wheat is made. I did not know that the wheat berry, after being cooked, is pressed between rollers and comes out in long strings. Knowing that now, I would think that was a shred. I think that means "shred" to me. If I had never seen shredded wheat biscuit and had not known that name for so many years, I think I would immediately describe Kellogg's Whole Wheat Biscuit when I saw it as shredded wheat biscuit. It seems to me now that that would be the first thing that would occur to me. Maybe it has been so well placed in my mind that I am not able to think of anything else.

I would think I have practically known the old shredded wheat all my life. When it was first introduced, it was the first product of that kind I had ever seen. It has had that appearance, that size and shape. I would distinguish Kellogg's Whole Wheat as a product similar to shredded wheat. Our thousand or so outside accounts are retail grocers scattered throughout the state, mostly service stores of one kind or another. I do not know whether orders for shredded wheat come in from those stores or from our own group. I would much rather think that orders for shredded wheat would come from our group of stores.

I cannot recall ever seeing an order come in for Kellogg's shredded wheat. Our orders are taken by our own salesmen and are sent in by code number, so that would not be very likely to occur, unless a customer came in or called up.

As a buyer I am not directly connected with the selling end of my organization, except insofar as we have to act as our own sales managers for the various stuff we buy. I have said the methods used by the Kel-

logg Company in featuring Kellogg's Whole Wheat Biscuit would be effective in creating a demand for a new product. I would say the same if similar methods were used on shredded wheat. I have noticed the extensive magazine and newspaper advertising of shredded wheat. I do not recall seeing a demonstration of shredded wheat in any of the stores I happened to be in. I at once recognized the shredded wheat package and said I had known it for many, many years, which I do not suppose could have been brought about except by considerable effort on the part of the sponsors of that item. When a salesman gets an order for shredded wheat, if is filled with shredded wheat like Plaintiff's Exhibit 1. The shredded wheat representative has called upon me and informed me that the National Biscuit Company within the last six months had quite an extensive campaign of sampling shredded wheat in this neighborhood. The National Biscuit Company man had a jobber within the past thirty days, telling me they were putting out an advertising sampling campaign. He has not been successful in selling shredded wheat to my house. I would not like to answer the question as to whether that is due to any controversy or any feeling on the part of the Godfrey house towards the National Biscuit Company. There was possibly a misunderstanding of our cookie set-up that we had with the National Biscuit Company at one time. We do not carry any of their line. We do not buy any shredded wheat or Wheatsworth cereal, or anything of that sort now, and we do not recommend the National Biscuit line to our chain. Some of them carry the National Biscuit line. They get certain products direct from the National Biscuit Company. Included in that may be some shredded wheat, which the National Biscuit Company distributes along with its other items.

RE-DIRECT EXAMINATION.

THE WITNESS: I do not know that there are any rumors against the National Biscuit Company, as far as the retailer is concerned. Neither do I know that there are any rumors or feeling against the National Biscuit Company towards any other or with any other wholesale house outside our own. That feeling has not colored my testimony here today a bit. I am just trying to state the facts as I know them.

My organization has not used any method of pushing the sale of Kellogg's biscuit or introducing it to our retail houses, or having our retail houses introduce them to the public, that I regard as any way improper

or illegitimate.

If I were a retailer and a customer came in and asked me for "a package of Kellogg's," I would have to ask him what Kellogg product he wanted. I have known of corn flakes a long time, practically the last eighteen years at least. I know Post Toasties, which, as far as I could describe them, would be a corn product flaked. If I had never heard of or seen a toasted corn flake in my life and was shown one of the Kellogg's Corn Flakes or one of the Post Toasties and asked what it was, if I knew it was made out of corn simply and if I was going to describe it to some one, I would say, "This is a piece of corn, flaked." I have never seen a business that would run itself, to my knowledge, or an item that would continue to sell without some kind of effort put behind it. Some items sold in the grocery business seem to move freely without a great deal of advertising or effort behind them, although they must and do have some. For instance, Fels Naptha soap and Cream of Wheat. I cannot recall any strenuous efforts behind those two items in the past few years. There are evidently tremendous amounts of money spent for national advertising, such as bill-boards, magazines, and so forth; but the work

in the retail store and house-to-house canvassing or sampling or advertising has been none to speak of in the last few years on those two items. It seems to me that those two items are outstanding in the consumers' acceptance of them. Those two items seem to occupy a high place in this market with the consumer.

RE-CROSS-EXAMINATION.

THE WITNESS: There is still considerable national advertising done for them. I was speaking of the intensive local effort. A nationally-advertised item might carry on for years, if they kept up the national advertising on bill-boards and magazines of great circulation, and items of that kind. It seems that way to me.

RE-DIRECT EXAMINATION.

THE WITNESS: Most of my retailer customers are buyers of Kellogg's Whole Wheat Biscuit, I believe.

RE-CROSS-EXAMINATION.

THE WITNESS: I am not in a position to say how many of them are buyers of shredded wheat. I would not know that. I know that many of them carry it, because the National Biscuit Company solicits their trade direct, every week at least, in the immediate vicinity of Milwaukee and the suburbs. They give them extremely good service, delivering it by their wagons. I do not want to be understood as intimating that shredded wheat does not have a very considerable sale in the district of Milwaukee. I do not know. I do not say that it has not.

Our house has a cracker line of its own. Along with that cracker line, we also have Kellogg's Whole Wheat Biscuit now. The cracker line is sold under the name of the I. G. A.

RE-DIRECT EXAMINATION.

THE WITNESS: That is a line something like the National Biscuit cracker the and it is competitive to them, I would say. I know of no way in which the National Biscuit Company uses the acquisition of the shredded wheat line to help the sale of their cracker line at this time. I have no direct proof that their shredded wheat product is sold by their cracker line salesmen. I have reasons to believe that they do, because they service the stores with their complete line.

MRS. MARIAN F. CONANT.

Deposition taken at Milwaukee, Wisconsin, March 16, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, and have a little girl. I came here today because a Kellogg man came to call at my door. I did not know him before at all. I use Kellogg's Whole Wheat Biscuit. I have used it more than three years, and I like it.

I had always used shredded wheat, and I asked for it, and the grocery man told me about this other product he had. I do not remember whether he had shredded wheat or not. Anyhow, he sent me Kellogg's Whole Wheat Biscuit. I liked it better than the shredded wheat, and I have always used it since. I believe he told me he had some other product than shredded wheat. My grocer never substitutes with me. He is a very reliable man to deal with. He often tells me, however, about new things, or if he is out of something, he will ask me if it is all right to send something else.

I continued to use the Kellogg biscuit after I tried them. I always ask for Kellogg's Whole Wheat

Biscuit now. I like the flavor of it, the size, and the way it is done up better. I liked the package. I always thought the shredded wheat package was not dust-proof. It seems to me that dust can get in at the top of the package there so easily. I like the way the Kellogg biscuit are done up in those little corrugated papers. I noticed that the National Biscuit Company shredded wheat would break up very easily. I think that is because the package is not done up so well.

It seems to me that the Kellogg biscuit is a better size, just enough to eat. It is nice for Mary Ann. I do not think she would eat a whole National shredded wheat biscuit. It seems crisper too; and it always seems to be fresher, but maybe that is because it is toasted. They advertise that it is toasted on both sides.

I am unbiased as between the two companies. I do not know anything against one company or the other, at all. I am only testifying because a man who was a stranger to me came to my door. I thought it would help him out if I came. He asked me if I used Kellogg's Whole Wheat Biscuit and liked it.

CROSS-EXAMINATION.

THE WITNESS: This man got my name from my grocer, Mr. Schaeffer. I asked him afterwards, and he said he knew I bought it and he told him. I do not know any of the Kellogg people at all. This Kellogg man asked me to come and tell my story here.

When I first used this Kellogg biscuit, I was living in a place near where I am today, just across from the Red Arrow Court, at least three years ago, maybe longer. I believe it was called Shredded Whole Wheat Biscuit at that time. Prior to that time I had bought shredded wheat for a number of years, because it is the only cereal I ever eat. I never cared about any

other cereal. I have used shredded wheat for a great many years in a package like Plaintiff's Exhibit 1. That was the only item of that kind I knew up to the time I met the Kellogg biscuit. I used it quite continuously for a number of years.

When I received this package of Kellogg's biscuit, I think I telephoned him and asked him for shredded wheat. I believe he said he did not have it, but he had Kellogg's Whole Wheat Biscuit, that was a shredded wheat. He said it was the same thing or something like that, on the same order, and he sent it up to me. It did look like shredded wheat, resembled it in many ways, was the same sort of material and the same kind of biscuit. I am not sure whether that package had a window in it like Plaintiff's Exhibit No. 161. The last package I got did not have it. It had a picture of a dish on it on both panels, like Plaintiff's Exhibit 161. I think I remember seeing the two biscuit advertised in a dish like that, but I do not remember whether it is one biscuit or two biscuit. Looking at Plaintiff's Exhibit No. 10, I really could not say I remember seeing two biscuit like that. I remember seeing biscuit advertised in a dish. I think. with fruit on it. I remember the package you show me with one biscuit in a dish. They always used to have the horses in front of the factory. Then they put the automobiles in front of it, modernizing the picture. You see I noticed that. I really know shredded wheat, too. I can remember that far back. It seems funny because that is the only cereal I eat. I always seemed to like that kind of cereal, even when I was a small vodnester. I always had shredded wheat.

I serve Kellogg's Whole Wheat Biscuit to my youngster by taking it out of the package, putting it in a dish on the table with cream and milk, and she puts

sugar on herself. Sometimes I serve bananas with it. My husband eats it occasionally. He prefers a cooked cereal.

RE-DIRECT EXAMINATION.

THE WITNESS: My husband will eat Kellogg's Whole Wheat Biscuit. He likes it, but he really prefers cooked cereal. I could not tell whether he knew it was a new biscuit. I do not know whether I might have put it over on him as shredded wheat. He really is not so crazy about it.

When my grocer sent me the Kellogg biscuit I did not think he was sending me toasted corn flakes or bran or anything of that sort.

When I looked in it I saw absolutely it was the same thing, and I liked it better. I did not think he was sending me the shredded wheat package, that had first the horses and then the automobiles. I knew it was not that package. I knew it was a Kellogg product, immediately. I noticed a difference in the size of the biscuit and that there were more biscuit in the package.

MRS. O. W. DUMMER.

Deposition taken at Milwaukee, Wisconsin, March 16, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, and I have three girls. I am a user of Kellogg's Whole Wheat Biscuit. I have used it for years. I use all the other Kellogg products, like Rice Krispies, Corn Flakes, Bran, Whole Wheat Bran. I use those and the Whole Wheat Biscuit.

The Kellogg name on a product means a great deal to me. If I have any other package on the table, the children always say, "Well, what is the matter with Kellogg's?" I dare not have anything else, because the children all have their favorites in the morning. The little one, four years, has Whole Wheat Biscuit. The oldest one has corn flakes. They all use Kellogg products.

Kellogg's Whole Wheat Biscuit first came to my attention through Steinmeyer's Grocery on Third Street. I had always gotten shredded wheat. I happened to ask for it and he said "Did you ever try Whole Wheat Biscuit? It is something new, and it is

much better."

I said, "What is it like?" And he said "It is supposed to be something like shredded wheat, but it is better." He brought it out, and I have been using it since. This occurred at my home. He comes up to my house every week. That is how he induced me to get it. He is just a salesman at the grocery store, not connected with the Kellogg Company. Since I was introduced to the product I have been using it. You can find it in my house every day, I like it better than the old shredded wheat biscuit because it is a smaller biscuit, for one thing, and it is toasted nice and brown, more so than shredded wheat. It has more of a flavor. You can eat it without adding any fruit, just simply sugar. It has a wonderful flavor. You could not eat shredded wheat without any fruit or flavor of some kind. Shredded Wheat has more of a flat flavor; but Whole Wheat has a different flavor, sort of sweet. The package is easier to open and more sanitary.

CROSS-EXAMINATION.

THE WITNESS: The Steinmeyer Grocery is one of the largest here, both wholesale and retail, cash store. They take my order. When the driver comes to the door, he collects. The man comes to the house on Wednesdays, and the groceries are delivered on Friday, collection being made on delivery. The Steinmeyer Company has used that method for a long time. They carry a large stock of groceries. I sometimes go to the store, and I have stores around me, too. I go to Steinmeyer's store mostly on Friday or Saturday. They carry shredded wheat. I know they used to carry it, but I am not buying it myself, now. I buy Whole Wheat there. I have not noticed shredded wheat when I have been in the store recently. I do not buy my staples when I go to the store. I pick those up in the neighborhood. My little girls come home from school, and they can go in and get the biscuit in the neighborhood stores.

I had been buying shredded wheat for many years. It is quite an old brand and comes in a package like Plaintiff's Exhibit 1. I would say I have known it for many years, practically all my life, and always as shredded wheat, always the same. I now ask for Whole Wheat, because it is a different biscuit. It looks like the old shredded wheat biscuit; but shredded wheat is not toasted as brown and is not formed into as small a biscuit. It does not have the flavor. I took Kellogg's biscuit as a substitute for shredded wheat. Kellogg's Whole Wheat Biscuit fills the same want as shredded wheat. When the salesman was taking my order. I asked for shredded wheat and he said, "Did you every try Whole Wheat Biscuit? It is something new which we have just gotten in. It is something on the order of shredded wheat, a smaller biscuit and you get more biscuit to the package." I do not know whether it was the same price or not. I pay either ten or twelve cents a package. He said it was Whole Wheat Biscuit, that it looked like shredded wheat, but was something different. Since I have tried it, we have used it. I do not use shredded wheat now. I could not use shredded wheat any more, because the

children would not eat it. They like it much better because of the flavor of it and everything. My family and I are Kellogg fans. They just sent in a Rice Krispies top for one of those little colored booklets. They have not got a Wheel of Knowledge yet.

RE-DIRECT EXAMINATION.

THE WITHES: I do not know anybody connected with the Kellogg Company. A man came to the door. I was shopping in some store at Thirty-fifth and Fond du Lac. They had a Kellogg special of two or three or four products. It was cheaper than the price I usually pay. I put my name and address on there, and then the young man I met in the hall came up to the house and asked me why I bought it, whether it was a bargain or what I thought of the products. I told him I have been using these things for years, that only the Whole Wheat Biscuit was new and that I used that right now. Then he asked me to come down here. The man I met in the hall was one of the Kellogg salesmen. I never met him before. This incident of the grocery boy telling me about a new product has happened before. Whenever they have something new they always mention it to you. I am interested in new products. I try them, and if they are satisfactory, I keep buying them.

RE-CROSS-EXAMINATION.

THE WITNESS: I cannot say offhand what other products I have tried. When I order baking powder, I just use a certain brand, Calumet. If a person asked me to try the Royal, I would not try it. I am satisfied with the one. I have been using Calumet for years. I had been using shredded wheat for years, too. That is just it. He told me it looked like shredded wheat but it was a different biscuit. That is what made me try it. That is what put it across for me.

RE-DIRECT EXAMINATION.

THE WITNESS: I use Kellogg's Corn Flakes. I have tried the Post Toasties; but the children do not care about it.

RE-CROSS-EXAMINATION.

THE WITNESS: Other things my grocer has suggested to me in that way would be canned goods or something like that. If I want canned peaches, I have a certain brand, Del Monte. If I am not satisfied with Del Monte, I will try another. If I am satisfied with one brand, I will not try another. What made me try Kellogg's biscuit was that he said it is something new and you get more biscuits for your money. He said they were smaller, and I tried them.

RE-DIRECT EXAMINATION.

THE WITNESS: When I opened it and looked at it, the man had told me to try the new biscuit, when I asked for shredded wheat.

RE-CROSS-EXAMINATION.

THE WITNESS: It did look like shredded wheat; but I could see it was a little different, smaller and toasted browner. After I tried it, I was more satisfied with it. It had more of a flavor than shredded wheat.

RE-DIRECT EXAMINATION.

THE WITNESS: If I asked for Calumet Baking Powder and a man told me he had a new one, I would not try it. I have tried it before. I have tried Dr. Price's, Royal, and Rumford's, and other different brands. I would not experiment further, nor would I with this biscuit. I am well satisfied with Kellogg's. I am not satisfied with the old shredded wheat biscuit.

16 Deposition of Mrs. Margaret Tyler

We cater to Y. W. C. A. members and outside trade also. We handle Kellogg's Whole Wheat Biscuit in the individual cartons. We have handled the Niagara shredded wheat, but I have not bought any recently. In fact, I think I have only bought that once, since it is made in the small size. When I used to buy it in individuals, they were large biscuits, like the individual carton Defendant's Exhibit 72. I think I have bought them in the smaller individual cartons like Defendant's Exhibit 71 just once.

We have all our cereals, whether Grape Nuts, Pep Flakes, or what, some of each displayed on our counter, put out with a cereal dish and the carton right beside it. The customers help themselves to whatever cereal they wish. In the coffee shop we do not sell selfservice. Kellogg's biscuit is all I have bought recently. I believe we still have some of the Niagara biscuit. We did have some recently. So far as the smaller biscuit are concerned, I can truthfully say I do not think the customer knows the difference between the two. With a larger biscuit, they would always take the small biscuit in preference to the larger biscuit. When Niagara shredded wheat was shown in a carton like Defendant's Exhibit 72, the customers would take Kellogg's biscuit in preference. I have not bought the short Niagara shredded wheat recently. I have had no complaints from my customers since I ceased buying the Niagara shredded wheat.

CROSS-EXAMINATION.

The Wirkes: I have ceased buying shredded wheat. I have not bought any recently. I have a few, but I am not building up my inventory on it, for no particular reason, except I have been buying Kellogg's assorted package. I get a large case of assorted in-

Deposition of Mrs. Margaret Tyler

dividuals from Kellogg's, including their Whole Wheat Biscuit. I could not say how many of Kellogg's biscuit I have on hand. There not bought any this month. The reason I am not ordering shredded wheat biscuit is that it will be more convenient to me to get my Whole Wheat Biscuit from Kellogg's. I hold no particular brief for Kellogg's biscuit nor any grudge against the National line. I am impartial, I think, as far as that is concerned. In my opinion, the customers could not tell the difference between them. If they did, I did not question. We put them out there, and I do not think they did. They are both very much alike.

I have been familiar with shredded wheat in the large package, like Plaintiff's Exhibit No. 1, for a considerable period of time. I have been in charge of the Y. W. C. A. cafeteria two and a half years. I had other restaurant experience in a hospital in connection with dietetics. I have had occasion to use shredded wheat in hospitals, so I have known that product for many years. If the biscuit were served outside the package in a dish, I do not believe the average customer could tell which one it was. People do not notice very closely.

RE-DIRECT EXAMINATION.

THE WITNESS: I think, if a biscuit were put alongside the plate in the larger carton, like Defendant's Exhibit 72, the average customer would notice the difference. I simply mean the customer would not notice the difference between the short shredded wheat and the Kellogg's. The Kellogg package and the Niagara Falls package do not look alike, but I thinkpeople know they are getting a small biscuit when they pick up that package. Knowing that, they do not care very much whether they are getting Kellogg's or Niagara Falls. That is what I mean.

RE-CROSS-EXAMINATION.

THE WITHESS: Before I used Kellogg's biscuit, I was using the old shredded wheat. It was O. K. then, because I did not know anything about Kellogg's biscuit, until I got the biscuit that was smaller and suited my needs better.

RE-DIRECT EXAMINATION.

THE WITNESS: It is common practice for my grocer to tell me about new products he has. I sometimes try them, and sometimes not. There are very few I try, because I have certain brands in the house. I use nothing but Calumet Baking Powder. Some canned goods I use are Del Monte's, some Boundey's. In this line I use nothing but Kellogg's. I have the Whole Bran, and even make muffins for the children out of it. I have the whole Kellogg outfit, the Whole Wheat, corn flakes, and the Rice Krispies.

MAURICE FISHKIN.

Deposition taken at Milwaukee, Wisconsin, March 16, 1933.

DIRECT EXAMINATION.

The Witness: I am a grocer, having been in business since 1927, and in no other business before then. I operate my own store and have one other with a partner. They are the Park Hill Food Market, 3903 Ciyburn Street; and Fishkin & Zellin, 3500 West Fond du Lac. We sell fruits, vegetables, and groceries. They are semi-self-service stores. We have our stock arranged so the customers can wait on themselves, partly, if they want to. We handle in those stores Kellogg's Whole Wheat Biscuit, like Plaintiff's Exhibit 161. We have handled Kellogg's biscuit for about

six months. I know what kind of product is in the package. It is a biscuit toasted on both sides. I have examined them. It is smaller than shredded wheat, but it looks like shredded wheat. It is the same thing. It is certainly a shredded biscuit. I handle another product of that kind, shredded wheat. We never stock anything until we have to have it. We had a demand for Kellogg's biscuit among our customers. We never did anything to create that demand, except having demonstrations. There was more than one item. Those demonstrations on Whole Wheat Biscuit occurred quite a while after we stocked it. At the time we stocked Kellogg's biscuit we had done nothing to create a demand on the part of the public for that biscuit: but customers came into our store and asked for it. That is why we handled it. Aside from the demonstrations of Kellogg's products, including Whole Wheat Biscuit, we have never done anything else to create a demand for the product. We did not have enough money to bother with either one of them, Niagara Falls or Kellogg's. We simply hand out that product to people who ask for that biscuit. either ask for shredded wheat or Kellogg's Whole Wheat Biscuit. Both of them are displayed on our shelves side by side. Neither one of them is any better displayed than the other. We have one row of each. They sell about the same as far as I can see, with regard to both stores that we have. We stocked the Kellogg product in response to a demand that, as far as we were concerned, had already been created.

Cross-Examination.

THE WITNESS: The people come in and ask for it and we have to have it. I never put it in before that. I never saw the Kellogg salesman until this fellow came around to me. The first time he came around was three or four months ago, after we took it on, after

I had bought my first Kellogg biscuit. If we had only had two or three calls, I would not put it in the store. I have five or six hundred customers a day. When calls came as often as every day, I felt it was time to put it in, so I put a call in for the Whole Wheat

Biscuit and stocked it.

I sell the Niagara shredded wheat, and I do not think this hurts the sale of shredded wheat any. I think we sell as many shredded wheat today as we ever did. Kellogg's Whole Wheat Biscuit did not take any customers from shredded wheat that I know of. I do not know. I do not wait on all the enstomers. I know the customers who bought shredded wheat, the ones, I know are distinctly apart. It is hard to say that it did not take any customers at all. I made no effort to call their attention to the Kellogr biscuit when they asked for shredded wheat. There was no reason to. We get the same price for both. I am twenty-five years old, and I have been in business for five or six years, my second or third store. I have been in business that long. I first started in business when about twenty years old. I do not carry the Kellogg product in a package with a cellophane window, but in a package with a picture of a dish on both sides. I have had some of the cellophane-front packages in Clyburn Street. I never brought it up, because I do not bring any displays of nationally-advertised goods on my floors. I have other things more profitable to sell. I put no cereals on the floor. They always ask for them. I do not take to displays of cereals, nationally-advertised products, because I realize the national advertising moves the stuff.

I described Kellogg's Whole Wheat Biscuit as shredded wheat, because it looks like shredded wheat, but it is a smaller biscuit. If people change to it, they do it because it is a smaller biscuit that goes further. The people who change to Kellogg's realize they are

getting something that fills the same want as shredded wheat. In fact, that is right.

When I got the Kellogg biscuit, I recognized it was like shredded wheat. It resembled it, except that it is toasted browner than shredded wheat, and is a different color. I realized it did resemble shredded wheat. When I answered Mr. Clarke's question and said it looked like shredded wheat, I did that because of my familiarity with this old biscuit.

RE-DIRECT EXAMINATION.

THE WITNESS: When I decided to stock the Kellogg biscuit, I just ordered it from the jobber. I asked him if he had Shredded Whole-Kellogg's Whole Wheat Biscuit. He said he had, and so I ordered it. The jobbers all had it, so I just ordered it. The customers do not wait on themselves in that department. We have a counter. I handle the Niagara Falls shredded wheat, but I do not handle any of the other National Biscuit products. We get the same discount on our shredded wheat as they allow on the cracker, because we are the Monarch Stores. They give us the regular discount. We get the cracker discount without buying the cracker line, on the Monarch Company. That discount is a bigger discount than is given to one who just uses Shredded Wheat alone. will not give more than 10 per cent. otherwise. They give us 171/2 per cent. If I were buying shredded wheat alone and were not in Reed & Murdock, I would get only 10 per cent. discount, unless I bought a hundred dollars worth. If I handled only shredded wheat and were not a Reed-Murdock store, I would get 10 per cent. discount on the shredded wheat. If I handled the shredded wheat and the rest of the National Biscuit line, and sold a hundred dollars worth, I would get 171/2 per cent. discount, which I get although I do not handle the rest of the cracker line.

ELMER S. KELLY.

Deposition taken at Milwaukee, Wisconsin, March 16, 1933.

. DIRECT EXAMINATION.

THE WITHES: I am thirty-eight. I am Milwaukee's representative of the Kellogg Sales Company. I take care of Milwaukee County, Washington County, Waukesha County, and the County of Ozaukee, comprising about twenty-eight hundred grocery stores, including the chain stores.

Kellogg's Whole Wheat Biscuit has been introduced in my territory. In the grocery stores we have, I think, approximately 50 per cent. distribution in this territory. The restaurant distribution will run the

same.

I have personal knowledge of the methods and policies of the Kellogg Company used to introduce their Whole Wheat Biscuit to consumer demand and attention in my territory. We have not done any newspaper advertising to equal the consumer demand for it; but we have done promotional work, held Saturday promotion sales in several stores where we sold a combination of our packages, including one package of biscuit at a price. In some stores we would give away a book, and in some stores we would include a free package. In others we would just make it a price proposition. We have taken one of the chain groups here and have sent out coupons telling the lady to bring it back to this store with the purchase of one package and receive another package in return. We would then call on all the chain stores, making displays of our products, including Whole Wheat Biscuit, in a spot in the store where he would call the attention of the lady to it.

In one other group, where they handled Whole Wheat Biscuit exclusively, they are to run advertising

in their newspaper ads about once a week. They have taken our Whole Wheat Biscuit as a sort of private brand of their own. They display it in all their stores and sell it. Their business on that is very good. Up to . date, for the first two months, I have about thirty per cent. of my quota for the year sold on Whole Wheat Biscuit. In the restaurant trade it is a little different. We made up a case of assorted goods and included Whole Wheat Biscrit in that. I know about it, because we packed the cases. We took all our restaurant size products in the warehouse here in Milwaukee and made up a case of our own, because we found some restaurants would want one and others another. When we packed a hundred cases of one item, it was too much for them. We always included twelve packages of Kellogg's biscuit in every case. The factory has since made their own combination. I think this is where we started it. That made distribution in the restaurants, where we sold a combination case and got distribution on the bisenit.

The national office of the chain stores got the lists from all their stores of names and addresses to send postal cards to. We asked them for at least seventy-five names per store. The clerks in the stores had their customers sign these lists. It looks like a petition of some sort. Then we sent those postal cards to those names. We have only done store demonstration work in connection with our Saturday sales. No house-to-house work has been done in this territory, not in the City of Milwaukee. We did it outside, in Racine and Kenosha, Wisconsin. We went from house to house, selling one package and giving another free, or selling two packages and giving one package free.

In the dealer advertising I spoke of, they used our cuts, referring to Kellogg's Whole Wheat Biscuit, a cut of the package. They used that as one of their items in the sale. A little different store over here em-

ploys forty men, house-to-house solicitors for the store. They have their regular routes, and goods are delivered afterwards. They sold our biselit on the coupon idea, too, but the coupons were not printed on a postal card. They were left by these solicitors and picked up on their next trip back, calling for one package purchase and one free.

In our territory, we have some dealer cooperation in bringing the biscuit to the attention of the consumers where they mention Kellogg's Whole Wheat Biscuit to their customers, especially when we came out with it first. When we changed the name and called it Whole Wheat Biscuit, we called their attention to it again and ran an advertisement. We have window and floor displays in the stores of retailers, and we have also had dealers who will print their own posters and put it on the window, a cooperative group.

They ask for Kellogg's Whole Wheat Biscuit now. The various methods of which I have spoken would have the effect of calling the Kellogg Biscuit to the attention of consumers. That is where we received our demands for it and built up our sales by talking to the people. In the last food show, we sold that product in a booth. We had a chance there to contact the housewife and talk to her about Whole Wheat Biscuit, explaining better than we could do in going from house to house. That show was at the Milwaukee Auditorium for seven days. The attendance was about twenty thousand a day.

Kellogg's Whole Wheat Biscuit is serviced to retailers and restaurants in this territory through the jobber, except in special campaigns when we sold it to them direct from our car. We would purchase it from the jobber and sell it to the retailer at the same price we purchased it for. We had a campaign on Whole Wheat Biscuit where we sold nearly every good grocer in Milwaukee on it, just to stimulate a demand for it on

the wholesale grocer, when we made displays in the stores. We sold the goods to the wholesalers and turned around and helped to resell them to the retailers. We have furnished the trade with window displays, store-cards, and other selling helps. We put them in ourselves. The Kellogg men would go to these different stores where the retailers would permit them to put up window displays or posters, ledge displays, and over ice-boxes, placards or posters or empty containers. We have used the stands with the large or small display cartons. One we call the counter stand and the other one we use in the window displays. In sampling other products from house to house we would at times include a circular on Whole Wheat Biscuit. We sometimes packed a package of one individual biscuit in with a package of corn flakes, within a cello-. phane container. The business in Kellogg's Whole Wheat Biscuit in this territory is increasing. We had a considerable gain last year. We came in here from scratch and built up a business where it is in the thousands of cases in a year. The sales methods we have used to create consumer demand on the biscuit have been practically the same as those used on other Kellogg products, with the exception that, as times and periods change, we do different things. The fundamentals are the same as we have used on every one of our products.

In towns where we have already used newspaper advertising, we have had from fifty to seventy-five per cent. retail store distribution of Kellogg's biscuit. That is outside my own territory.

The sale of Kellogg's biscuit in individual cartons is pushed. When we call on the restaurants, we always ask them to buy a case of our Whole Wheat Biscuit. We have a sort of counter card, that a small individual size biscuit fits in, showing a dish with two of the small biscuits, with some sort of fruit. We use that in the

restaurant counter displays. We ask them to print it on their menus, and we furnish them a little slip mentioning Kellogg's Whole Wheat Biscuit, that can be attached to their menus as a special for that morning. There is the regular percentage of self-service stores in our territory. In some places there seems to be a tendency for regular grocers to arrange their stores so they can either be served or serve themselves.

CROSS-EXAMINATION.

The Witness: The device of placing a sample of Whole Wheat Biscuit in a package of corn flakes has not been generally done, just where we ordered it out specially. Where we did it, a customer purchasing a package of corn flakes would find a sample of the biscuit right on top. She does not know that until she gets it home and opens the package. It is inside the sealed package of corn flakes. In that way, she gets it home without knowing it.

I have been with the Kellogg Company almost nine years and in the Milwaukee territory seven years in October. When I said we started here from scratch, I had reference to the start of the sale of Whole Wheat Biscuit as a new product. Other Kellogg products had been introduced in Wisconsin prior to that time I think we have been selling the biscuit approximately four years now. In that period we have acquired about 50 per cent. distribution. When we first started with the biscuit here, it was called Kellogg's Shredded Wheat Biscuit. Plaintiff's Exhibit No. 165 is the carton we started here with, called Kellogg's Shredded Whole Wheat Biscuit. I do not know whether that was the first carton. The first one, I think, was a nar rower one, like the one you now show me, Plaintiff's Exhibit No. 166.

I do not remember when the word "shredded" was discarded from the product pame. Maybe it was

in the last two years. Our campaign to establish Kellogg's biscuit in Wisconsin has been possibly a trifle more active since the change in the name. We have taken on in turn one product after another as they came. 'I did have some sales effort back of the biswcuit three or four years ago, when it was called Shredded Whole Wheat Biscuit, in the regular way. We had it from store to store on our list of items. We. did the same as we did with corn flakes. We did not sample it to the housewife. The sampling from house to house we have never used in Milwaukee. I am only familiar with the fact that it has been used elsewhere. We have not used it here, for reasons of tax and license, and things of that sort. When we sent out the coupons the retail store furnished the free package and was paid for it by the Kellogg Company. That work is just being done. We have used no newspaper ads in the Milwankee territory. We do not carry ads in Racine or Kenosha at this time. At the time of our canvass in Racine and Kenosha, they were included in the Milwankee territory.

I do not remember seeing any articles in the newspaper about Kellogg's Whole Wheat Biscuit. in this territory about a year ago. Looking at Plaintiff's Exhibit 200, a sheet from the Reading Eagle, Thursday, April 28, 1932, and an advertisement ringed in red. I might have seen one or two that some of the fellows showed me. I do not recall it. I have seen one or two instances of that type of advertisement. Some of the boys doing promotional work might have shown them to me. I believe I knew that advertising of that kind was being conducted by the Kellogg Company. I did not see any advertisement or anything similar to itsin the Wisconsin papers on that product. I never saw any ads in the Janesville papers. I have seen a copy of the Oshkosh Northwester, but I have never noticed a Kellogg ad in it.

RE-DIRECT EXAMINATION.

THE WITSES: The sample of Kellogg's biscuit inside the package of toasted corn flakes was in a cellophane envelope, on which was something about giving a free sample of Whole Wheat Biscuit to try it. The name Kellogg's appeared on the envelope, just the same as it is on the package.

MRS. GRACE HATFIELD.

Deposition taken at Milwaukee, Wisconsin, March 16, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am assistant manager of the Cafeteria at the Y. M. C. A., 633 Fourth Street, in the basement. We cater to the public. It is arranged like a regular cafeteria, with the food right on the counters. We handle both Kellogg's Whole Wheat Biscuit and shredded wheat. Defendant's Exhibit 70 is the form of package of Kellogg's biscuit which we handle in the cafeteria. Defendant's Exhibit 71 is the form in which we handle National shredded wheat, in that size.

Those packages are in the regular cereal dishes, put right on the counter. They are not opened. The customer goes along and helps himself to whichever one he wants. I do not know how they sell, but I think that Kellogg's biscuit is preferred more than the National. I buy Kellogg's myself. I think the majority of people in our restaurant take Kellogg's. They simply take the plate with the carton, open the carton, and dump the biscuit out on the plate. I do not think we have handled Whole Wheat Biscuit so long. We have handled shredded wheat for years. We buy Kellogg's products through a wholesale house, R undy Peckman & Co., I think. I do not do the buying. They come in the cartons in a case. We buy a whole case.

CROSS-EXAMINATION.

The Witnes: We carried shredded wheat biscuit before we carried Kellogg's Whole Wheat Biscuit. We have carried Kellogg's products for some time, though. We have carried shredded wheat biscuit for many years. I have been in the restaurant business ten years and think I have had it all that time. We used to buy it in the larger package and put it out in the dish some time ago. I have been familiar with shredded wheat longer than ten years. It is a very well-known product, has always been known as shredded wheat, and has always had the same general appearance.

RE-DIRECT EXAMINATION

The Witness: The small shredded wheat cartons, like Defendant's Exhibit 71, have been popular in the last couple of years or so. Otherwise we could put our corn flakes and stuff out in dishes. I do not think we have ever had the longer individual carton like Defendant's Exhibit 72. When they were larger, we served them just out in the dishes. We have had the smaller biscuit since we have been handling them in the individual carton. That has been about two years. When we handled the longer Niagara Falls biscuit, we had them in the large cartons. So far as I know, in this territory, we have only seen them in cartons like Defendant's Exhibit 71. I do not remember seeing them larger in the individual cartons.

MRS. MARGARET TYLER.

Deposition taken at Milwaukee, Wisconsin, March 16, 1933

DIRECT EXAMINATION.

THE WITNESS: I am food service director at the Y. W. C. A., 610 North Jackson Street. We have a cafeteria and coffee shop, both of which I manage.

I buy my Kellogg biscuit through jobbers. I have bought some directly. If you do, you get them through the jobber anyway, so I have discontinued buying them directly.

When I bought the Niagara shredded wheat, I bought it through the jobber.

CLAYTON LOUIS KOLVOORD.

Deposition taken at Chicago, Illinois, March 16, 1933.

FURTHER RE-DIRECT EXAMINATION.

THE WITERES: Today I purchased a package each of Kellogg's Whole Wheat Biscuit and shredded wheat biscuit at Lakota's Lunch, 602 North Third Street, a regular lunch room. Both the Kellogg's biscuit and shredded wheat were on display. I asked the lady for a package of Kellogg's Whole Wheat Biscuit, and for a package of National Biscuit shredded wheat. She started to put them in a sack, but I told her it was not necessary. I paid her for them and walked out.

Plaintiff's Exhibit 70 is the package of Kellogg's Whole Wheat I bought and bears my initials, C. L. K. My initials are also on Defendant's Exhibit 71, the other package I bought. There was no large-sized National shredded wheat in that restaurant. The Kellogg biscuit was on our little restaurant display, showing the bowl, and the sliced banana on top, the display we had out yesterday. The National shredded wheat was just on the counter. I did not see any display of it, or any of the regular size like Defendant's Exhibit 72.

I am familiar with the National shredded wheat in Chicago restaurants. I think you will find that, at present, most of the biscuits are the smaller size. I think possibly in the last six or seven months, those biscuit have been stocked, like Defendant's Exhibit 71. Be-

fore, the National biscuit was the long one in the long individual cartons, like Defendant's 72.

Defendant's Exhibit 73 is a mat, used in newspapers in printing up or making a cylinder for printing the advertisement about Wheel of Knowledge free with two packages Kellogg's Whole Wheat Biscuit. This is a cut submitted to the grocer when he turns in his newspaper ads.

RE-CROSS-EXAMINATION.

THE WITNESS: My jurisdiction includes parts of Wisconsin. I work out of Chicago. I go out into the various territories and work with various men on merchandising and advertising tie-ups. I was in Peoria two weeks ago, where we had a Saturday trade promotion sale. I worked with Mr. Hooper on the advertising. I get into Wisconsin. I have not been to Kenosha, Racine, or Oshkosh. I get to Janesville, Madison, Reedsburg and towns over there. I know of Swanson's in Janesville. I know Mr. Murphy, of the Janesville Gazette, one of the leading papers in Rock County and Janesville. It is a paper of some antiquity, a very good advertising medium. I am not familiar enough with Mr. Swanson to say for sure, but I assume he carries Kellogg's Whole Wheat Biscuit. I imagine he also carries shredded wheat. I have seen ads of the Swanson Grocery in the Daily Gazette, but I do not identify Plaintiff's Exhibit 14-Y on the interrogatories as one I ever saw.

RE-DIRECT EXAMINATION.

. THE WITNESS: I have personally encountered the short National shredded wheat, like Defendant's Exhibit 71 outside Chicago. I noticed it at Bishop's Cafeteria, in Rockford, Illinois. I brought this package here from Milwankee. I have seen the short National

shredded wheat in Chicago restaurants and in most of the Illinois restaurants where I have eaten. In the last six months, they have had the smaller-sized package like Defendant's Exhibit 71.

MRS. MARIE BENEDICT.

Deposition taken at Milwaukee, Wisconsin, March 16, 1933.

DIRECT EXAMINATION.

THE WITHESS: I am manager of Wrigley's Restaurant. We feed between three thousand and thirty-five hundred people a day. It is about as large a restaurant as any in Milwaukee and is located at 636 North Second Street. We call it a self-service, similar to a cafeteria but no rail. A person goes to the counter girl and asks her for what he wishes. She serves him the food from the one position. We have two steam tables. The cereals are served from what we call the fry station, at the end of the counter.

We handle Kellogg's Whole Wheat Biscuit, also National shredded wheat biscuit in the individual cartons like Defendant's Exhibit 70. We handle Kellogg's biscuit in the individual package. We handle the National or Niagara shredded wheat in the small sized carton, handle it the same as Kellogg's, like Defendant's Exhibit 71. I do not think we have ever handled the Niagara Falls shredded wheat in the short individual carton. I have been in Milwaukee a year and have handled shredded wheat that long. I would not say for sure whether it has been this short biscuit during that time. I have only been buying for six months. During that time, I am sure I have used the small one, like Defendant's Exhibit 71.

We have no special display of cereals. We just have them all out, shredded wheat and whole wheat and bran, about fifteen different cereals, in individual cartons. The customers get them by asking the counter girl for the designated cereal. She takes it off the railing or counter in back and puts the carton in the cereal bowl. The customer opens the carton. They designate which one they want. If they ask for Shredded Wheat, they are served Shredded Wheat. If they ask for Whole Wheat Biscuit, they are served Whole Wheat Biscuit. I would say about the same proportion of each is sold.

A Kellogg man calls on me. I buy all my Kellogg cereals from him through the jobbers. The others I buy direct from the jobbers.

CROSS-EXAMINATION.

THE WITNESS: I have only been here a year. 'I had previous experience in the restaurant business in Minneapolis, in the same company. It is a chain restaurant, having restaurants in Minneapolis and Milwaukee. I have been in that line since July, 1931, two years.'

RE-DIRECT EXAMINATION.

THE WITNESS: I do not know if we carried Kellogg's Whole Wheat Biscuit at Minneapolis. I had nothing to do with the buying. I worked nights for the company. I cannot answer one way or the other, because I am not sure. I did not pay enough attention to it at that time to know about it.

GEORGE MILLER.

Deposition taken at Detroit, Michigan, March 17, 1933.

DIRECT EXAMINATION. -

The Witness: I am forty years old, a restaurant man. I have been in that line of business since 1910 and now conduct a restaurant of my own under the name of Miller Brothers Restaurant at 4165 Cass Avenue, which I have had for eight years. It is not a cafeteria. It is a grade B restaurant. I serve cereals. They are under display. There is a lunch counter between the display of cereals and the customer. The cereals are stacked up in back. They are in individual packages.

I carry Kellogg's Whole Wheat Biscuit in the individual mackages and have done so for about two and a half or three years. I carry no other Whole Wheat Biscuit. I do not carry Niagara shredded wheat. I believe I have carried it about three years ago, but not since then. The majority of my customers, when they want whole wheat, ask me for Kellogg's biscuits. A few ask for shredded wheat. When they say that, I say nothing, just present them the package with the bowl and the cream, the individual carton of Kellogg's biscuit. I never have any complaints from my customers. None of them says it is not what he wanted. If some customer who had never seen it before would ask what kind of biscuit was in it I would say Kellogg's biscuits.

CROSS-EXAMINATION.

THE WITNESS: I carry it on my menu as cereals. I do not list the Kellogg product. Cereals includes all my cereals. I do not have shredded wheat on the menu. My m mu is on a large card permanently printed, one fold. We do not print a new one every day in the week. We do not mention Kellogg's shredded wheat or Kellogg's biscuit by name. We just say cereals; that means everything. On our shelves back of our counter, I have different kinds of cereals. I used to carry shredded wheat three years ago. I have been in that location since 1925 and in the restaurant business since 1910. I have always known shredded wheat. I have known it since before 1910 and right along until two

and a half or three years ago. Then I cut it out and took Kellogg's Whole Wheat Biscuit instead. I found them better, baked better and a better taste, to my fancy. The Kellogg salesman did not sell me that biscuit. I got it through my jobber. I took it for a trial. I used Kellogg's Whole Wheat Biscuit instead of shredded wheat biscuit, and it served the same purpose. It looks like shredded wheat. When my customers ask for shredded wheat, I serve them this Whole Wheat Biscuit. I present them the package. I do not sit down and explain to them that it is Kellogg's. When I have a customer who says, "Give me a serving of shredded wheat," I take this Kellogg package with two biscuit in and give it to him, without any explanation, and he accepts it.

RE-DIRECT EXAMINATION.

THE WITNESS: The customer opens the package himself sometimes. Sometimes we do it for him. When a customer asks for shredded wheat, I give him Kellegg's biscuit, because that is all I handle. No customer has ever told me it was not shredded wheat I gave him. There is a difference in size between Kellogg's biscuit and the Niagara biscuit. I serve the Kellogg carton with those regular cereal bowls.

(The witness was excused and left the stand. Later, during the early part of the testimony of the witness Douglas Rumball, the witness Miller telephoned with regard to the menu.)

Mr. CLARKE: Just let us put on the record here that, in connection with Mr. Miller's testimony, since he left the stand he has telephoned and stated to Mr. Vilas and to me that he finds that his menu refers to Kellogg's Shredded Whole Wheat Biscuit; and it is stipulated that the defendant may here offer in evidence one of the menus as a defendant's exhibit.

Mr. VILAS: Yes, and that some one connected with either the plaintiff or the defendant may pick it up during the noon hour and bring it back to the hearing room.

MR. CLARKE: Yes.

(The menu referred to was later produced, after the noon hour, and was received in evidence and was marked "Defendant's Exhibit No. 74.")

MORRIS GOURWITZ.

Deposition taken at Detroit, Michigan, March 17, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am thirty-eight, a grocer, with my own stores at 8405 Hamilton Avenue and 7624 Meyer Road. They are conducted under my name. I have conducted the Hamilton store nine years, and the Meyer Road store will be one year next month. I have had experience in the grocery business myself about

ton years.

I handle in the two stores Kellogg's Whole Wheat Biscuit. As far as my knowledge permits me to explain it, it is a whole wheat biscuit similar to shredded wheat, smaller and a little darker, toasted nicer. We also carry shredded wheat. I have handled the Kellogg biscuit ever since they came out. It used to be Kellogg's shredded wheat biscuits. I put one case in and handled it then. I continued with it ever since. I cannot tell how long it has been called Kellogg's Whole Wheat Biscuit; but I know we have been selling more since it has. There is absolutely a demand for that Kellogg's Whole Wheat Biscuit, which is why we carry it in stock. We have never put any dealer push behind it. We sell it entirely on that consumer demand. The

customers come in and ask for Kellogg's Whole Wheat Biscuits, the same as they would for Kellogg's Pep or Kellogg's Corn Flakes. They ask for the other shredded wheat as shredded wheat. There is so much difference between the two that there is no confusion between them in our store. Shredded wheat is outselling Whole Wheat immensely; I should judge about sixty to forty per cent. The demand for the Kellogg product has been increasing, I believe, possibly due to the fact there is more advertising. More people seem to know about it.

Choss-Examination.

THE WITNESS: I have been in this one place for. nine years in May. I just worked as a grocery clerk. before. I have been about ten years altogether in the grocery business, nine years for myself. During all that time. I have carried shredded wheat, as far back as I can remember. I do not know whether I knew it before I was a grocer. I have not been an eater of shredded wheat. At present I eat mostly cooked cereals. I do not eat either product. All the time I have been in the grocery business, I have had Shredded Wheat on my shelves. There has always been a certain demand for it. It has been a well-known product. People come in and ask for shredded wheat. The Kellogg Company put out this Whole Wheat Biscuit, which they once called shredded Whole Wheat Biscuit. It is a biscuit similar to shredded wheat. I mean it is the same sort of product, looks like it to a certain extent. It is not toasted as nice, and it is smaller. It is the same kind of food. As far as I am concerned, I guess all cereals will answer that same purpose. That is my personal taste. I do not know if it can be served as shredded wheat. If I were in the restaurant business, I could possible answer that better. It is similar to shredded Wheat Biscuit. It will answer the same purpose, as far as I know, and so will Kellogg's Corn Flakes. They answer the same purpose if all you want to do is fill up their stomachs, Pep, Grape-Nuts, and

everything else.

I cannot say how Kellogg's have created the demand for their Whole Wheat Biscuit, because I do not know what medium of advertising they have had or what efforts they made to create the demand. I know they put it in my store, and I am carrying it. People come and ask for it. They never ask for Kellogg's shredded wheat at all. If they ask for shredded wheat, I know what they want and I give them Shredded Wheat. I know that right away. It is pretty hard to tell if the forty per cent. of demand for the Kellogg product has resulted in a decreased demand for shredded wheat. We carry several items. I was ready enough to say it was sixty to forty, because I know how I order it.

Before Kellogg's Whole Wheat Biscuit, there was nothing else like shredded wheat on the market. At that time, shredded wheat, as a biscuit, had the field. So we can assume that, before Kellogg's biscuit came, shredded wheat sold a hundred per cent. As to whether the forty per cent, that Kellogg's now sell consists of former shredded wheat users, here is an answer: Five years ago, when I took the store, we had done approximately twenty-four thousand dollars, part of which time we had Kellogg's Whole Wheat Biscuit. We did sixty-seven thousand collars last year; so you see our shredded wheat biscuit has increased, and so has Kellogg's Whole Wheat Biscuits. Our entire business has increased. I cannot tell you now whether that consists of new Kellogg's Whole Wheat Biscuit users or in part of customers who used to buy shredded wheat. We have been increasing our business every year since I have been in business, so I really cannot answer that question, as to whether Kellogg customers today, or any of them, are former shredded wheat customers. Customers are peculiar. They will take first one item, and then, in two weeks or so, want something else. They take corn flakes, then start using Pep, then get tired of Pep and go to something else. My youngster at home will do that. They change around from one to the other. I do not know any particular customer who used to buy shredded wheat and who now buys Whole Wheat Biscuit.

RE-DIRECT EXAMINATION.

THE WITNESS: When I sell Kellogg's Whole Wheat Biscuit, I sell it in a carton. I just deliver the carton.

DOUGLAS RUMBALL.

Deposition taken at Detroit, Michigan March 17, 1933.

DIRECT EXAMINATION.

The Witness: I am thirty-two and manager of a grocery store, Warren & Eastlawn Market. I have been connected with that organization two years, which is my entire connection with the grocery business, except when I was a youngster. I was in the office furniture business until two years ago. We have displays where the customers can help themselves and some do, but we serve them in most instances.

We carry Kellogg's Whole Wheat Biscuit and have since it was put out. We also handle the Niagara Falls shredded wheat. There is a demand for both those products in our store. If a person wants shredded wheat, she asks for shredded wheat. If she wants Kellogg's biscuit and knows the product, she will ask for Kellogg's Whole Wheat Biscuit. I have explained the Kellogg biscuit to customers, through information that was given to me. If they want something, maybe, in

the shredded wheat biscuit line, I explain to them both the lines we have. I tell them it is a new line, and, if they would like to try it, I am perfectly willing that they should. In these times, we have to sell almost everything. All the biscuit are sold in cartons. I tell them about the double-toatted feature of Kellogg's biscuit, which was explained to me.

I have experienced no confusion in our store between those two products, never had a customer return one and say she wanted the other. The last two months, I have ordered twice on Kellogg's Whole Wheat Biscuit to once of the shredded wheat biscuit. I have customers who come in and ask for Vellogg's Whole Wheat Biscuit. I have two customers who always take Kellogg's biscuit, since they have been out. I know practically all my customers and just about what they use. To be frank with you, I have never eaten either biscuit, so I do not know what either one of them is like. I know their appearance. If I had to describe Kellogg's Whole Wheat Biscuit, I would say it is shredded wheat. There is no difference.

I cannot recall any of my customers asking for Kellogg's shredded wheat. They may possibly do so. It is correct, then. If a customer asked for Kellogg's shredded wheat, I would give her Kellogg's Whole Wheat Biscuit. The name signifies that. In the last two months I have ordered twice as much Kellogg's as shredded wheat. I think we usually buy twelve of each or half a case, whatever it is. I think we get Kellogg's in twelves.

CROSS-EXAMINATION.

THE WITNESS: I buy shredded wheat in a small case of twelve, from the National Biscuit salesman. I have only been in the grocery business two years, with nothing more than childhood experience before, just working through deliveries. I was in the office furni-

ture business before. Mr. Tothill is running the butcher shop of the Warren & Eastlawn Store, and I am managing the grocery end of the business as an employee. I have no stake in the business. I handled Kellogg's biscuit since it was first brought to me, within my two years' experience. The man on the Kellogg truck brought it to my attention, and I stocked it. At that time, my customers had not been asking for it.

I have been familiar with shredded wheat, like Plaintiff's Exhibit 1, for the last two years. I have known it a long time, practically all my life. I am not an eater of that type of cereal; but it has been familiar to me through advertising and through seeing it in my home, ever since I can remember. It has always been called shredded wheat. It has been a very well known product. Up to the time Kellogg's biscuit came out, there was no other cereal like it, that I know of.

Answering Mr. Clarke, I said Kellogg's biscuit is shredded wheat It is, in my mind. That is the name for it. I do not know anything else to call it. It is shredded wheat. If a customer asks what the biscuit is that Kellogg is putting out as a whole wheat biscuit. if I am looking at the package and see right up there Kellogg's Whole Wheat Biscuit, that will enter my mind, and maybe I will say it is shredded wheat biscuit. If a customer says "What is Kellogg's Whole Wheat Biscuit?" I will say right away it is shredded wheat -biscuit: and that is what it is. Possibly that is because that old shredded wheat biscuit has been so well known for so many years, that particular biscuit. In the last two months, I have ordered two to one on Kellogg's. That last two months is the only time. Prior to that, shredded wheat outsold Kellogg's or may have been even with it. There was a time when shredded wheat had the field as that kind of biscuit, and then Kellogg

came in. We made displays of Kellogg's Whole Wheat Biscuit. Naturally, people are going to be asking you about any merchandise displayed. They came in and set up the display of packages themselves, giving us placards and other devices to attract attention to the biscuit. We do not advertise it ourselves, except to put it in our window with a price on it. We use the papers occasionally. I never had a Kellogg item in the newspaper. I never had a deal on, selling and pushing Kellogg products and giving one free.

I know two customers who always take Kellogg's. I do not mean you to infer from that that customers will sometimes buy Kellogg's and sometimes shredded wheat. These people will practically always ask for Kellogg's Whole Wheat Biscuit. I do not remember any customers who will buy one sometimes and the other another. I would say that the shredded wheat people usually stick to shredded wheat; but some of them have been switched over to Kellogg's biscuit since it was introduced.

In the last two or three years in which the Kellogg biscuit has come into my store and assumed a position as an article in demand, I would say shredded wheat sales have fallen off and Kellogg's has come in.

RE-DIRECT EXAMINATION.

THE WITNESS: I order Kellogg's twice as often, and some Kellogg man will come along and ask how long we had it in and if we would like it changed. In the two years I have been there, I never had a shredded wheat man ask me that. They do not only do that for Whole Wheat Biscuit but anything of theirs. If I ask them to change something for me, they readily do so. The National 1. an, Mr. Rickit, comes in and asks me if I need Shredded Whole Wheat Biscuit. If I do, he takes it down.

RE-CROSS-EXAMINATION.

THE WITNESS: You are not to understand from that that the Kellogg people take back shredded wheat because it is slow. It is a pretty good mover.

RE-DIRECT EXAMINATION.

THE WITNESS: We have not had any demonstrations of Whole Wheat Biscuit in our store, just window and store displays. I think they give samples here. No, it was an open front in the box. That is the only thing we had to show, like Plaintiff's Exhibit 161. All the Kellogg's Whole Wheat Biscuit we sell are in the big cartons like Plaintiff's Exhibit 161. We do not handle the little individual-size cartons. Of the two biscuit, shredded wheat is the larger. I believe there is a difference in the number of biscuit in the carton.

RE-CROSS-EXAMINATION.

THE WITNESS: I think that was pointed out to me by the Kellogg representative. He never made any comparison to me, except in so far as to open the package and showed it to me. If he showed me it was fifteen to the box, it was necessarily compared to the shredded wheat biscuit, which is a larger biscuit and has twelve to the box. That is certainly so.

RE-DIRECT EXAMINATION.

THE WITNESS: I never had any customers tell me the Kellogg product was not shredded wheat biscuit, that I know of.

JOHN E. LURIE.

B

Deposition taken at Detroit, Michigan, March 17, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am thirty-three, a grocer, with two stores of my own, conducted under the name of Murray Brothers, Inc., at 8450 Grand River Avenue, Detroit, and 214 Washington Drive, Royal Oak. They are genseral markets, service stores, with self-service features where they can go and help themselves. The store in Detroit has existed nine years and the one in Royal Oak five years.

We handle Kellogg's Whole Wheat in both stores. We also have the other product, Niagara shredded wheat. I have handled the Kellogg biscuit since it came on the market. It was first called Kellogg's Shredded Wheat Biscuit. Since it has been known as Kellogg's Whole Wheat Biscuit, it is selling more rapidly now. There is a consumer demand for it. Some people ask for shredded wheat, and they get Niagara Falls shredded wheat. Some come in and ask for Kellogg's Whole Wheat Biscuit; and some people ask for Kellogg's shredded wheat biscuit. I give them then what they ask for, Kellogg's. Today, I think the two biscuit sell about fifty-fifty, half and half.

I give dealer co-operation to the Kellogg Company, window and store displays. Naturally, those displays help the sale of the Kellogg biscuit. If a customer asked what kind of biscuit is Kellogg's Whole Wheat Biscuit, I would say it is a shredded wheat biscuit. The consumer demand for Kellogg's biscuit has been created, largely, I suppose, through co-operative advertising and the advertising of Kellogg's Whole Wheat Biscuit by the Kellogg Company. We have done co-operative advertising of that product, carried by our stores and referring to it, in newspapers and circulars.

CROSS-EXAMINATION.

THE WITNESS: We advertised it as Kellogg's shredded wheat biscuit, when it was known as such and sold in a package like Plaintiff's Exhibit 165. I do not know if Kellogg was advertising it then. We did. When it first came out under that name, I do not know whether they did or not. The Kellogg Company have furnished us with cuts, whether for the biscuit or not I am not sure.

I have been at this one store nine and a half years. I have been in the grocery business all my life. It is safe to say that I have known those shredded wheat biscuit, like Plaintiff's Exhibit 1, all that time. I have: always carried it, and it has always been a good seller. I know that the Shredded Wheat Company has advertised its product very extensively. We had displays of shredded wheat, and I think we have had demonstrations of it. Up to the time I began handling Kellogg's biscuit, I do not believe there was any other product on the market that resembled shredded wheat. As far as I know, that type of biscuit, shredded wheat biscuit, had the field, up to the time Kellogg's biscuit came in. Since that time, Kellogg's biscuit has commenced to sell and has reached a point where I should judge the sales are about equal.

I do not think the present users of Kellogg's Whole Wheat Biscuit are former users of shredded wheat. It is absolutely new business, I think, or a lot of it. I cannot say that is true, but I can say there are a whole lot of new customers for Kellogg's Whole Wheat Biscuit. I get new customers for shredded wheat. They are created, like Whole Wheat Biscuit customers are created. You keep on advertising it and sampling it, and you make new customers. I believe shredded wheat sales today are exactly as great as they were before the Kellogg product came on the



been in the family ever since I can remember; I imagine, about ten years. The biscuit has not always been the same size. I have noticed a difference. We have had this other biscuit in the house. I knew the difference in the biscuit as soon as it was placed before me. My mother brought the Kellogg product in the house. When it was set before me. I distinguished the difference. I said it was not the same biscuit we had always had, and she said no, that it was a new biscuit Kellogg had put out. I tried it and liked it very much. I noticed immediately it was a smaller biscuit and a difference in taste. It seemed to have more of a flavor and more of a body to it, more compact, and I liked it a good bit hetter. We have continued to use it since. It has been in the house all the time.

CROSS-EXAMINATION.

The Witness: Before that, I had been using shredded wheat, like Plaintiff's Exhibit 1, the one I have been using a long time. I have had it off and on in the house, but I have also had Kellogg products. I do not mean to say I have had Whole Wheat Biscuit for ten years. I have been eating shredded wheat off and on, about the same length of time we have had Kellogg's biscuit. I did not mean to tell Mr. Clarke I had been using Kellogg's Whole Wheat Biscuit for ten years. Prior to the time I used Kellogg's biscuit, I had been eating shredded wheat and had been familiar with it.

When my mother first set the Kellogg biscuit before me, I saw it was a smaller biscuit. I did not think the Shredded Wheat Company was making a smaller shredded wheat. I knew it was a different product, right away. I thought someone else was making them. My mother brought me the biscuit in a dish, so I did not see the package; but I was told about it. My

mother told me all about it. I knew when I got it that it was a different biscuit, so I was not really taken by surprise. I liked it very much better than the old shredded wheat biscuit. Since then, I have not been using the old but the new.

RE-DIRECT EXAMINATION.

THE WITNESS: I do not know any of the Kellogg people. I came to testify here today because somebody came to the house.

MRS. DOROTHY TIEDEMAN.

Deposition taken at Detroit, Michigan, March 17, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, no children, no other occupation. I use Kellogg's Whole Wheat Biscuit and buy it in large cartons like this. I have been buying that product about four years. When I went to a friend's house and stayed there overnight, I had it for breakfast. When I went home at noon, I went to the store and got a package. I noticed it was better than the product I had been using. I happened to see the box and bought some for myself. I have continued to use it.

I have used the other shredded wheat, before I used Kellogg's. I like Kellogg's lots better. It is smaller and toasted on both sides. I noticed those qualities the first time I ate it.

I do not know the Kellogg people. Somebody in the store asked me if I would come down today and testify.

Cross-Examination.

THE WITNESS: That was Kroger's Store, where I do my purchasing. They also have shredded wheat,

like Plaintiff's Exhibit 1. I have been purchasing that there. I buy Kellogg's Whole Wheat. I do not buy the package like Plaintiff's Exhibit 1; but I used to. I have known it a good while. For quite a number of years before I knew about Kellogg's biscuit, I was buying shredded wheat biscuit. It is safe to say that I have known about that product pretty much all my life. It is an old product, well known. I had it at home when I was a little girl. It was always in the house then, and it was known as shredded wheat then.

The first time I knew about Kellogg's biscuit was when it was served to me while I was visiting my friend's house. I saw the box and went to Kroger's and bought it. I have been using that ever since. I do not use the old shredded wheat any more.

RE-DIRECT EXAMINATION.

THE WITNESS: I have always bought it in this solidfront box. I have never seen any of the cellophanefront boxes.

MRS. MARGUERITE L. BROWN.

Deposition taken at Detroit, Michigan, March 17, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, no other occupation, no children. I am a consumer of Kellogg's Whole Wheat Biscuit, having used it about a year and a half. I buy it in packages like Plaintiff's Exhibit 159. I have never had any of the cellophane-front boxes.

I first became acquainted with Kellogg's Whole Wheat Biscuit, like Plaintiff's Exhibit 159, in the Smith store. I saw it on the shelf and tried it, because it said Whole Wheat, that name attracting my attention. At one time I had used that other biscuit with Niagara Falls on. There was nothing about that that occurred

to me in connection with the name Whole Wheat. I did not even know that name. This seemed browner. I thought it meant whole wheat. I did not know. I have continued to use the Kellogg biscuit since.

I have tried the Niagara Falls biscuit, but they seemed soggier. I mean, it seemed to soak up the milk or cream quicker. I have continued to use the Kellogg biscuit and buy it at Kroger's. Smith's did not seem to have it any more. I also noticed that I like the size of Kellogg's biscuit better. The other is too large for us. The small size is just right.

I came to testify today because a man asked us over at the Kroger store and took our name. I do not know any of the other people.

Cross-Examination.

THE WITNESS: It was a man in the Kroger store who asked us. I do not know whether he was a Kroger man. At that time I was in there to get something. They had a Kellogg special on, and the Kellogg man got my name and asked me if I would come down.

I had used shredded wheat, like Plaintiff's Exhibit 1, some years ago, I remember, at the Soo, up in Canada. We have not used it much since, because we had more or less cooked cereals. But I did use it years ago, and I am familiar with that package. I have known it as shredded wheat. I bought it a few times in Detroit. Then I saw the Kellogg product on a shelf, tried it, and liked it better. Since then, I have not bought any shredded wheat.

I'de not remember examining the reading matter on the shredded wheat package. I see now, Only the genuine, Niagara Falls on the end, The Home of Shredded Wheat. On the bottom of the package I now see shredded whole wheat. I never noticed it before. I see: All the bran in the wheat, and: All the wheat, nothing added, nothing taken away. I never read it

before, I guess. I know, now, that it is whole wheat biscuit. I have found it out since then.

RE-DIRECT EXAMINATION.

THE WITNESS: I have continued to use the Kellogg product. I like the size of it.

FRANK W. MAHAN.

Deposition taken at Detroit, Michigan, March 17, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am thirty-two; district sales manager for the Kellogg Sales Company. I have been connected with them for eleven years, next June. I was retail salesman for two years and a half and have been branch manager since. I am district sales manager in this district now. I handle the entire State of Michigan, a portion of northern Indiana, and a small portion of Northwestern Ohio, including Toledo. Kellogg's Whole Wheat Biscuit has been on sale in my territory all the time I have been here, five years in April. When I first came here, it was the smaller box, and then in May or June of 1928, they changed to the present style of box and the name, Whole Wheat Biscuit. In this district it has been so known since May of 1928, as I recall.

I have knowledge of such work as has been done in this territory to create consumer demand for Kellogg's biscuit. We have done practically all types of promotional work you can do on cereals: house-to-house sampling. Occasionally, in towns, we have sold direct to consumers, house to house. We have poster displays in the stores, on the floors and in the windows. We have done some merchandising work with the grocers, with a small premium attached to the packages, such as a

book for children. We have sold this product in combination with a number of our other products, in stores on Saturdays. We have mailed samples to a list of selected prospects by R. F. D. and local city delivery. We have distributed coupons in towns, good for a free package with another package bought at the local grocery. I think that would cover all the times.

Those methods have been successful in introducing Kellogg's Whole Wheat Biscuit to consumers. A demand for that product exists among the stores in my territory. There are about thirteen thousand independent stores and approximately two thousand chainstore outlets in my territory. As nearly as I can estimate, I have about fifty-five per cent. distribution of Kellogg's biscuit among the so-called independent grocers, and a little less than that among the chain stores. Those percentages are growing right along. The business is increasing.

I know of Niagara shredded wheat. We are more or less directly in competition with that biscuit in selling Kellogg's Whole Wheat Biscuit. Generally speaking, the retail price of Kellogg's biscuit has been a little higher than that of the Niagara product.

I have used quite a quantity of the cellophane packages like Plaintiff's Exhibit 161, but not all the packages in my territory have been cellophane-front packages. The percentage would vary, because, at different times, our promotional efforts would require their use and other times, they would not. In some places we have had quite an extensive use of that type of package, and in other places we have not. At some time or other that package has been used throughout my territory. I determine the proportion of cellophane fronts and sold fronts used in my territory. The home office charges us with a portion of the additional cost of that cellophane-front package; so, if my local district orders the cellophane fronts rather than the other,

I am charged with more cost than when I use the ordinary non-cellophane-front packages. I prefer the

cellophane-front packages.

The name Kellogg's have, of course, been a help in creating a consumer demand for Whole Wheat Biscuit. The rest of the products enjoy a good reputation among the consuming public; and that product, if brought to the attention of a consumer who has used other Kellogg products with satisfaction, helps us in the sale of it. There is an endorsement of quality to the name.

We pride ourselves on the good efforts of the merchandising salesman; but the methods we have used are methods that could be and have been used for the merchandising of any strange product. They are effective methods.

CROSS-EXAMINATION. .

The Witness: I am acquainted with the DuPont man who has sponsored most of the cellophane package development on all products in the world. I am sold on the use of cellophane as a merchandising aid on any product which can be properly wrapped in cellophane, to show the consumer what is inside the box. The advantage I claim for it is that the customer can see the product. In this instance he sees the ends of the biscuit through the window and purchases the product on the strength of what he sees. I would not say that entirely, but that has something to do with it, of course. They are not buying blind. They can see what they are getting. I think it adds to the salability of the package to see the biscuit inside.

I.was never employed by the Shredded Wheat Company. I have been familiar with shredded wheat a long time, and our Whole Wheat Biscuit we sell com-

petes with the shredded wheat biscuit.

The comparative volume of sales of the two products varies from month to month and one wholesale market to another. Without access to the distributors' books, I could not make even a guess. I did not hear any witnesses testify this morning. If one grocer said he sold two of one to one of the other, I would not want to say that is true of the entire territory I have jurisdiction over; but I do say that Kellogg's Whole Wheat Biscuit has distribution in commercial quantities in my district, in competition with shredded wheat. Possibly some of that distribution is at the expense of shredded wheat. I would think some of it was. I know that it is. I would expect to have some former users of shredded wheat among the users of our Kellogg's Whole Wheat Biscuit. The two products are similar and they answer a similar want.

The Kellogg Company has done newspaper advertising in my territory in a great many towns. We had a general newspaper campaign in the spring of 1932, in which little reading-matter heads with ad lines referring to shredded wheat biscuit were put in the papers. We ran a fairly extensive campaign. Plaintiff's Exhibit 200 was the general style of the reading type of copy run in newspapers in this territory.

Four or five different copies like that, carrying a headtine and little reading matter, were run about a year ago in about eighteen towns in Ohio and Indiana.

We have very little to do with the bulk of advertising put out by grocers. At certain times when we are doing work in a town, we solicit definite support from the grocers. The bulk of retail grocer advertising is made up by them. We cannot contact with all advertisers.

I am acquainted with Gilmore's Self-Help Grocery, in Kalamazoo, Michigan. They carry our product. Plaintiff's Exhibit 201-A is the ad of the Gilmore store. I do not think we wrote that copy. I was not in

town the day this happened. We have made suggestions as to the type of copy to run, but we do not prescribe it in all cases. We do suggest copy. We never make advertising allowances to customers in cases like that, in our territory. There is no form or method that I know of, by which dealers are encouraged to advertise our products, by way of a discount or advertising allowance or extension of credit, or anything like that. I do not think I remember the incident, but I think this is Gilmore's ad. I do not know that I would care to identify it. There is such a store in Kalamazoo, and they advertise groceries in the Relamazoo Gazette. I do identify it as a Gilmore ad, although I do not know definitely when it was printed.

(A full page of the same publication containing the same ad was also received in evidence as Plaintiff's Exhibit 201-B.)

I recognize Plaintiff's Exhibit 202 as a standard or regular price list furnished by the Kellogg Company to all regular customers. I do not think the paper is a forgery. I do not know whether it is a standard price list or not. We furnish price lists like this to our regular customers. There is a cut on there of Kellogg's Whole Wheat Biscuit package. The price sheet is dated February 1, 1933.

We have had a customer in Flint, Michigan, the Central Wholesale Company. I have not done much business with him recently. He could still be called a customer. The piece of paper you show me is a new one, on me. I do not recognize it as having seen anything like that put out by them. I never saw anything like the second paper you show me, that I recall. I think there was one similar to this. This shows a picture of Kellogg's Whole Wheat package and two biscuit in a dish, to be addressed to store managers. I do not know whether this is identically the same one

I saw; but we have not used this in my district, to the best of my knowledge. One item in a letter is done occasionally. Usually they are in short paragraphs, in bulletin form.

(The sheet referred to was received in evidence and marked "Plaintiff's Exhibit 203," Mr. Clarke stating he would not question it was something done with the knowledge of the Kellogg Company.)

The Battle Creek Moon Journal is a well-known advertising medium, a paper of considerable circulation in Michigan, in Battle Creek. Some stores operating under the I. G. A. chain in Michigan are customers of ours. Our products are carried in the I. G. A. Stores in Battle Creek. They do considerable advertising as part of the voluntary chain.

Plaintiff's Exhibit 204 I recognize as an ad of the I. G. A. Stores in the Battle Creek Moon Journal of October 21, 1932. When I say I recognize it, I mean I probably did not see this particular one, but it is quite plain to me that it is a tear sheet from that paper, and it is their style of advertising. We did not prepare that ad. That is something the I. G. A. Stores put out themselves. They have their own advertising department.

I have heard there is such a store as E. H. Stillwell, of Kalamazoo, Michigan. I am not acquainted with it, and I do not know that they are one of the I. G. A. Stores. I have seen the style of handbill, like Plaintiff's Exhibit 205, used by the I. G. A. Stores. I do not know that I have seen this one. I recognize it as the style of advertising adopted by the I. G. A. Stores.

I told Mr. Clarke the business in Kellogg's Whole Wheat is a growing business. In 1933, the business grew over the year before it. In the current year, we

market, even better. So I do not think Kellogg has taken away any shredded wheat customers. So far as I know, it is a shredded wheat product. My own personal opinion is that Kellogg's Whole Wheat Biscuit is a whole wheat biscuit that has been manufactured of so-called shredded wheat and made into a biscuit; and I believe it fills or occupies a part of the field the Shredded Wheat Company occupied.

I call it shredded wheat biscuit because it has been sold to me in that form. It has been described to me as shredded whole wheat biscuit. There is the box there that tells you that. They called their shredded wheat at one time. I would still describe the Whole Wheat Biscuit which was formerly sold as Shredded Wheat, as shredded wheat today. I really. could not think of anything else to call it when Mr. Clarke asked me that. It is a whole wheat biscuit which is shredded, so that is what it is. It is hard for me to tell you exactly what I mean by shredded. I take for granted that it is shredded, because it is like shredded coconut, cut up in long, fine parts. When I speak of a thing being shredded, I mean it is cut up. I never went to Niagara Falls and saw them make it. I do not know how the so-called shreds are made.

Assuming it is true that the wheat berry is pressed between rollers and caused to come out in a long string, that is a definition of shredded. It is not cut up; it is pressed, if you assume that to be true. That is my idea of shredding. I never saw a corn shredder and do not know what it does to corn. I have sold shredded coconut all my life, and I do not know how they get it into that form. I sell shredded codfish. I know what it is like, sort of torn up into little threads.

MRS. HARRIET YOUNG.

Deposition taken at Detroit, Michigan, March 17, 1933.

DIRECT EXAMINATION.

I am a user of Kellogg's Whole Wheat Biscuit and buy it in a carton like Plaintiff's Exhibit 159, I believe, but not with the new cartons with the cellophane front. I have been a user or consumer of Kellogg's Whole Wheat Biscuit about six months, first became introduced to it by noticing it on the shelf in the grocery. We were about out of shredded wheat, and I asked if that was a shredded wheat They said yes, and I tried it and like it, because it is a smaller cake. I have continued to use it since that time. I like it because it is a smaller biscuit. I could only use one and a half of the other or larger biscuit. I use two of Kellogg's biscuit in a plate.

I came here today as a witness because a Mr. Mahan, of the Kellogg Company, came to the door. I did not know him before. The grocer, he said, had given him my name.

Cross-Examination.

THE WITNESS: I first came to know Kellogg's biscuit by noticing it on the shelf of a grocery. I was doing my own buying, happened to be in the store. The package I then saw did not have a window showing the biscuit. It had a picture with the biscuit in a saucer. I asked the grocer whether that was shredded wheat. I did not know they were putting it out, before. He said it was shredded wheat put out by the Kellogg Company. Before that, I had been a buyer of corn flakes and of shredded wheat in a package like Plaintiff's Exhibit 1. That was the larger bis-

cuit. I had used that before Kellogg's. I started using Kellogg biscuit about six months ago. Since then, we have not bought shredded wheat, but we have bought Kellogg's. I use two of the Kellogg's and used to use one and a half shredded wheat before.

By new package, I mean the window package which I saw here for the first time. I do not recall seeing or buying a package like Plaintiff's Exhibit 148. I have a family, one baby and my husband. My husband uses shredded wheat. I put it in a pan with some butter, put a lid on the top and steam the butter into it. I put it right on the stove. If the oven is lit, I put it in. I serve it hot.

RE-DIRECT EXAMINATION.

THE WITNESS: My husband likes the Kellogg biscuit. He did not notice the difference specially, other than that I told him I was getting it because they were the smaller cakes. Every time he was getting one and a half.

MRS. ANNA LETCHER.

Deposition taken at Detroit, Michigan, March 17, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, have no other occupation. I have no children and my husband is dead. I am a user of Kellogg's Whole Wheat Biscuit. I buy it in cartons, like Plaintiff's Exhibit 159. I have been using that biscuit for two years, anyway. That is Kellogg's biscuit. It is a small square biscuit about that size, toasted on both sides. I first became acquainted with it over at Kroger's. That is the kind they sell. We looked at it, tried it, and decided it was the best kind to get. That is how I became acquainted with it. They said they thought it was better. They

had the other at the time, but we took Kellogg's. I liked it because it is more toasted than the other, smaller in size, and better. The other is a longer biscuit. We have continued to use it and still use it and like it.

I came here today because we were over at Kroger's and they asked our name and some gentleman came to my door. I did not know who he was and do not know any of the Kellogg people.

CROSS-EXAMINATION.

The Witness: Before I met this biscuit in Kroger's store, I had not been using it. I knew about shredded wheat before that for a great many years. They are a well-known product, always known as shredded wheat; but we did not have it until we got this biscuit. We were at the house of some old friends one afternoon and they had Kellogg's biscuit. So then we went to Kroger's and got it. They told us they thought it was better. They had another product there, too, something on the order of Plaintiff's Exhibit 1. They showed as both; but we took what we wanted, Kellogg's. They told us it was smaller than the other, tasted better. I would rather have if, liked it better.

RE-DIRECT EXAMINATION.

THE WITNESS: I had already tried the Kellogg biscuit at my friend's house.

CHESTER WILLIAM CARR.

Deposition taken at Detroit, Michigan, March 17, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am twenty-two, not employed at present, a resident of Detroit, and a user or consumer of Kellogg's Whole Wheat Biscuit. That product has

answer what was asked me. He told me he would

pay my expenses.

I recognize the old shredded wheat biscuit right away, and Plaintiff's Exhibit 1. I have used that a long time, for many years. I have always been familiar with it as shredded wheat. I recognize the picture of Niagara Falls. I have been there and in the factory. I have known that biscuit for a long time and have been a user of it in my home.

When I saw the Kellogg biscuit at the house of a friend, it looked the same to me as the shredded wheat biscuit I have always known, as far as appearance was concerned. It was a smaller biscuit and flavored a little differently, and I thought I liked it a little better. I have ceased buying shredded wheat and turned over to Kellogg's biscuit.

MRS. MABEL M. POCOCK.

Deposition taken at Detroit, Michigan, March 17, 1933.

DIRECT EXAMINATION.

The Witness: I am a housewife, with one child. I have used Kellogg's Whole Wheat Biscuit. My fivst package was the little individual package with two biscuit in it, sent a friend of mine through the mail. She liked it so well, she told me to try Kellogg's. Then I bought it in the grocery. I asked for Kellogg's Whole Wheat Biscuit. It was evidently something new when I asked for it. It was not in a package with cellophane; it was a package like Plaintiff's Exhibit 167. I have continued to use Kellogg's biscuit. I like the size of it, the smaller biscuit. I was previously familiar with the Niagara Falls biscuit and had bought it for years; but I prefer the size of Kellogg's biscuit and I have continued to use it.

CROSS-EXAMINATION.

THE WITNESS: I have used the Niagara Falls biscuit for years. I remember I ate cold cereal. From the time I was a child we have had it in the house. That has always been familiar to me and always known as shredded wheat. It has become a sort of household word, more or less.

It was not until I saw this little package that I knew the Kellogg Company was making it. I recognized it as the biscuit with which I was so familiar. I saw it in the small package, ate it, and liked it. To my mind, it was not quite as coarse in the shreds as the other biscuit. So, from then on, I became a user of the Kellogg product. I am no longer a user of shredded wheat. I do not think it has been as long as two years since I started using Kellogg's. Before that, I remember I used shredded wheat.

RE-DIRECT EXAMINATION.

THE WITNESS: I do not know anybody connected with either of the companies. I just came down as a friend.

JULIUS D. FRANK.

Deposition taken at Detroit, Michigan, March 17, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a wholesale grocer connected with Frank M. Davidson & Company. I am president of the concern and have been for the last fifteen years. That is a wholesale grocers' organization. We sponsor the stores of the Minute Groceries, which have been in existence about a year and a half. We handle Kellogg's Whole Wheat Biscuit and have from the

time they started to manufacture it. It seems to me they put them out once as Kellogg's Whole Wheat Biscuit, and then they sort of discontinued them for awhile. We began to handle them from the time they have been on the market as Kellogg's Whole Wheat Biscuit.

We find a demand for them which is increasing right along. The Minute Groceries handle Hellogg's Whole Wheat Biscuit. Some of them carry the other brand, Niagara shredded wheat, and some of them do not. All or nearly all carry Kellogg's Whole Wheat Biscuit. They give dealer co-operation to the sale of Kellogg's biscuit and push them. They are advertised to the public under the name of the Minute Groceries. The biscuits are advertised under the name of Kellogg's Whole Wheat Biscuit. We have a man who takes care of arranging store displays or special sales for our group of stores. We have given store and window displays to Kellogg's biscuit in those Minute stores.

CROSS-EXAMINATION.

and a half old. Before, our house had not been a sponsor for any retail groceries. Those we developed in the wholesale trade. We continue to sell our trade generally, as well as to service those stores. There are about sixty-five or seventy in the chain. They come and go. They are independent retailers. They join our organization to participate in the combined buying power. We have uniform window displays and signs, and a green front for the stores; but the shelving and arrangement are left to the owner of the store. We have a man who makes it his business to help the merchants advertise and we get out circulars for them. We do not use the newspapers. Our house has been

in business about eighteen years, and I have been connected with it and with the grocery business just that time.

During that period, I have always carried shredded wheat. It is a familiar package, like Plaintiff's Exhibit 1. We list it just as shredded wheat. When shredded wheat is asked for, we furnish this, shredded wheat made at Niagara Falls. We give them that. The trade do not call them shredded wheat made at Niagara Falls; they just say shredded wheat, Sometimes they will return it and say they want Kellogg's Whole Wheat Biscuit. Most of them will ask for biscuits. Sometimes a foreigner will come in and not know just how to call for it. You have to bring out the package and show it to them. The average customer who asks for shredded wheat knows what he wants, and we know what he wants, the Niagara Falls shredded wheat. That has been the case for many years, and we do not try to substitute it. If he wants shredded wheat, we give him what he asks for. If he wants Whole Wheat Biscuit, we give him Whole Wheat Biscuit. There is sometimes confusion on the part of some foreigners and some people. Foreign stores usually do not handle cereals of any kind.

Sometimes people say they want shredded wheat. Then we ask them which kind they want, Kellogg's Whole Wheat Biscuit or Niagara, and we show them the packages and give them what they want. If we are in doubt, sometimes: as to what a man wants, we show him both products and let him make his selection. Not very often do we find they mean Kellogg's when they say shredded wheat. It has happened occasionally. To my mind, however, and to that of most of my customers, they say shredded wheat, meaning this product

made at Niagara Falls.

RE-DIRECT EXAMINATION.

THE WITNESS: I service other accounts besides these stores we sponsor. We have a demand from those accounts for Kellogg's Whole Wheat Biscuit also.

JOSEPH L. MOLITOR.

Deposition taken at Detroit, Michigan, March 17, 1933.

DIRECT EXAMINATION. ,

THE WITNESS: I am a wholesale grocer, under the name of Forester & Molitor. That firm has been in existence since July, 1922. I have been in the grocery business since 1908, also in the wholesale end, with Rohrig & Forester. Both Rohrigs died; then it was the present firm. I am just a partner in that concern. We run a cash-and-carry, also service, delivery, and charge. We have three salesmen who travel around Detroit. We carry Kellogg's Whole Wheat Biscuit, having had them ever since they came on the market. We find there is a demand for that product among the trade. I believe it has shown a little increase. I handled the product known as Niagara shredded wheat, at one time. I do not have any in stock right now and have not had any in for some time. I do not believe we bought over three shipments since the National took them over. I believe we had one shipment of ten or fifteen cases the latter part of last year.

The National service the trade with the Niagara product direct, most of them. That is one reason why we do not handle it. I have never experienced any confusion my store between Kellogg's Whole Wheat Biscuit and the Niagara shredded wheat biscuit. When

the National took over shredded wheat, we did not stock it. When we had calls for shredded wheat biscuit, we would have a package of Kellogg's on our counter or the man had it with him, and he would tell them we do not have shredded wheat, but we handle Kellogg's, which we think better than shredded wheat. and it was what we considered a profitable line, where they would have to buy a certain quantity in order to meet our prices. I am referring to the Niagara shredded wheat buyer. Then, of course, it would be convenient to order the National shredded wheat. when they come around to sell their cookies. If any of our trade demanded shredded wheat and would not take anything else, we would just give it to them. Our business has only two independent stores. are chain stores. All or most of our customers regularly carry Kellogg's Whole Wheat Biscuit. A lot of them do not. I do not believe I could state the proportion.

CROSS-EXAMINATION.

THE WITNESS: We threw out shredded wheat when the National took it over, because we could not profitably handle it when they were distributing it direct. I believe chain stores were then selling them two for nineteen. They cost us a dollar twenty-one flat, at that time. I do not know whether that is the case now. Once in a while we now have a demand for shredded wheat. At that time we tried to substitute Kellogg's Whole Wheat Biscuit for shredded wheat. We try that, and, if we cannot, we send out and get shredded wheat, if it is a good-paying customer. If not, we tell him we have not got it and let him find it for himself.

Having been in the grocery business since 1906, I knew shredded wheat almost from the start. I have handled a lot of it. Before National took it over, we

handled it very extensively all the time. It was a very well known product, and, if anyone asked for shredded wheat, there was never any doubt that they meant shredded wheat, like Plaintiff's Exhibit 1. I would say that it is fair to say that shredded wheat, during the first twenty-seven years of this century, became a household word, known throughout the country.

XQ. 45. My question now is You find that the Kellogg Whole Wheat finds ready substitute for

shredded wheat: do you not?

A. Yes, that furnishes a substitute.

The Witness: If a person asks for shredded wheat, we try to give him Kellogg's. We say we do not handle shredded wheat, but we will give them Kellogg's, which we say is practically the same. I have told a lot of people it is practically the same, except there are fifteen Kellogg biscuit and only twelve shredded wheat biscuit. I tell my customers that, too. I have told a lot of folks. Sometimes I can sell Kellogg's to a customer who asks for shredded wheat, not invariably. Sometimes I have to give them shredded wheat.

RE-DIRECT EXAMINATION.

THE WITNESS: I have not told them this is shredded wheat made by the Kellogg Company. We could not get by with that. I do not believe I could state truthfully how many accounts we handle. We are just a medium-sized wholesale house.

LOUIS LIGHTSTONE.

Deposition taken at Detroit, Michigan, March 17, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a wholesale grocer, under my own name. I am owner. Ours is a cash-and-carry wholesale grocery, and a very little service. We just

serve Detroit and a little suburban. We carry Kellogg's Whole Wheat Biscuit. I think we have carried it since they started to manufacture it. We find there is a demand for it in our house. That demand is increasing. We carry the other product, also, Niagara shredded wheat. We find no confusion between the two in our house. We have never had either one returned with the statement they wanted the other kind. They get whatever they ask me for. One they order as shredded wheat biscuit, and this one is Keilogg's Whole Wheat Biscuit. That is the way they order it.

CROSS-EXAMINATION.

The Witness: My customers are retail grocers. There is no difficulty in their minds distinguishing what they want. When they want shredded wheat, they say so. When they want Kellogg's, they say so. I have been in the grocery business about twenty-five or twenty-six years. I am quite familiar with shredded wheat biscuit. I have sold lots of it several years ago. I still carry it and sell it. It sells, but not so much as Kellogg's and no so much as it used to. I know the reason. It is distributed direct to our customers. I still stock about fifteen cases at a time. It is safe to say that I have stocked it under that form and name for all the time I have handled it, have been buying it right along.

EMMERAN ANDRE.

Deposition taken at Detroit, Michigan, March 17, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a wholesale grocer. The name of my organization is Alter & Andre, in which I am a partner. That is both service and cash-and-carry, in the east side of Detroit. We carry Kellogg's Whole

Wheat Biscuit and have ever since it came out. There is a demand from our retail customers for that product. I think it is an increasing demand. We also handle Niagara shredded wheat. The National Biscuit Company now owns that product. In many instances, it services its retailer direct with that product. We still have some business left in the National product. I think that probably is from some grocers who do not handle the National cracker line and who look for me to furnish them with National shredded wheat. That is my personal view of it. I do not get around to the stores.

I experience no confusion between those two products. I think they are the same general kind of product. Kellogg's product is ordered as Kellogg's Whole Wheat Biscuit.

CROSS-EXAMINATION.

THE WITNESS: It is ordered under the name Kellogg's shredded wheat. Some of our customers call it that. We handle about twenty-five cases of Kellogg's biscuit a month and seventy-five to a hundred cases of dozens, or bundles, of National shredded wheat. I have been in the grocery business for myself about two and a half years. I have been connected with it for twentytwo years. That has been my life experience. During all that time I have handled shredded wheat and have been familiar with it. It has been a familiar product to the trade and a ready seller at all times. My retail trade is familiar with it and has ordered it constantly. When our retailers send in an order for shredded wheat, that is what we give them. I would not say our business in shredded wheat has fallen off very much. It has continued pretty steady.

E. F. BRADEN.

Deposition taken at Detroit, Michigan, March 17, 1933.

DIRECT, EXAMINATION.

THE WITNESS: I am a grocery buyer with the Kroger Company, a chain store and retail grocery organization, with approximately forty-eight hundred stores in the central and western States. We are the buying organization for the Detroit branch only, on certain commodities. My organization handles Kellogg's Whole Wheat Biscuit. We buy it direct from the Kellogg Company for our own Detroit branch stores. There is a steady demand on us for Kellogg's Whole Wheat Biscuit. A certain amount of it moves out of our warehouse every week.

Cross-Examination.

The Witness: There are approximately six hundred and ninety retail outlets under our Detroit branch. Shredded wheat is purchased, contracted for, in the general office of the firm, and it is sent out on store delivery, as we do not stock it in the warehouse. It is delivered with the other National Biscuit line, and our stores are serviced by the National Biscuit salesmen. We have handled shredded wheat for many, many years. It was handled many years before I came here. I have been familiar with it all my life. I would say there is a demand for shredded wheat. It moves with pretty good steadiness through our retail outlets; and it has always been the same, as long as I have been here. I have been in the grocery business three years, in this office here, with Kroger & Company.

are not yet selling more than a year ago, compared to the same period. We are slightly under. When I said 1933 over 1932, I meant 1932 over 1931, the two years. That is already compared to a similar period last year. This has been somewhat less than it was a year ago. In 1932 over 1931, there was an increase.

I said the retail price of Kellogg's biscuit, in some instances, is higher than that of shredded wheat. I got that information from a number of stores and seeing advertisements, from my own observation, and from information from salesmen. The differential in price is quite general. In very few instances the reverse is true. I have run across a few places where the retail price of the Kellogg biscuit is less than that of Niagara shredded wheat. It is apparently generally true that the wholesale price of Kellogg's is less than the price of shredded wheat, if you equalize the grantities. The Niagara product has a price structure that is a little different than ours, in that we sell through only one type of distributor. Some wholesale prices by regular wholesale grocers on the Niagara product are quite a little higher than ours. In many other instances, with direct contact, they buy their product a little cheaper than they can buy ours from the wholesaler.

RE-DIRECT EXAMINATION.

THE WITNESS: There are self-service stores in our territory, like the Piggly-Wiggly chain and that type, a few.

I have charge of and knowledge of the restaurant trade in this territory. We have some distribution in restaurants, but the percentage is hard for me to estimate. I do not personally contact many restaurants. It is just a moderate distribution. Certain area, as is the case with retail stores, are better than

others. It is not anywhere near complete distribution. It will probably run 20 per cent., just as an estimate. Most of our restaurant distribution is in the individual package. Our men are more or less after the sale of those. We push the sale of individuals in restaurants, as against the large package. We try to discourage the distribution of the big box in restaurants. The distribution to the retail restaurant trade is through the wholesale grocer, generally. The National service the Niagara product through their own organization, from their own wagons, also through wholesale grocers.

The Kellogg Company pushes the sale of its Whole Wheat Biscuit to the retail grocer through their own salesmen. I understand the Niagara shredded wheat is sold by a representative of the National Biscuit Company, along with their biscuits, also through other

wholesale grocers.

The men who sell shredded wheat for the National handle the rest of the National cracker line, but not exclusively. A understand some of their men specialize on shredded wheat biscuit. That has been so in this territory possibly two years. Before that there was a time when the Niagara shredded wheat was apparently distributed exclusively by the cracker men here.

In most of the tests I have seen made, such as cigars, cigarettes, candies and macaroni and things of that kind, the use of cellophane has resulted in an in-

creased sale of the product.

I think I am stating the policy of the company when I say my understanding is that we call all our products by distinctive names. We refer to them in all our correspondence, billing, and so forth, by the complete name. The name of this product under which it is pushed in this territory, is Whole Wheat Biscuit.

In answering as to decrease or increase of business on Kellogg's biscuit, I based my estimate on comparing the year 1932 to the year 1931 and also the just elapsed period of 1933 with the same period in 1932. In the latter instance I found it to be decreasing.

RE-CROSS-EXAMINATION.

THE WITHESS: On the Kellogg biscuit package, it is spoken of as a shredded wheat product, and, on the other end, a reference is made to shredded wheat in its most delicious form. We call it Whole Wheat Biscuit in the correspondence, orders, and so forth. It is at times called shredded wheat.

It is my belief that I am telling the truth when I say it is a shredded wheat product. I do not think the Kellogg Company is deliberately lying when they print on their package that this is a shredded wheat product.

RXQ. 159. You do not recognize the expression "shredded wheat," used by the other company for their menus, as a trade name or something like that, do you?

A. What do you mean by a trade name? Do you mean what I think of the trade name? For instance, corn flakes is a trade name. That is the trade name of a product.

RXQ. 160. Corn flakes may be the trade name of a product, but it is recognized as a fully descriptive term, is it not? In other words, there are other corn flakes on the market, and the Kellogg Company has not stopped them?

A. Well, by trade name, do you mean something like Kodak or Uneeda?

RXQ. 161. Yes, I do.

A. Well, of course, my viewpoint in this thing has been slightly distorted, as you may realize

RXQ. 162. Yes, I think so, or slightly colored?

A. But I never regarded shredded wheat as Uneeda

Biscuit or Kodak, the trade name.

THE WITNESS: I do not regard shredded wheat as a trade name or as the name of a product. It does describe the product, in my estimation. That does not change it; but, as I say, my viewpoint may be somewhat distorted, due to my experience in the wholesale grocery, and so forth.

MRS. HELEN E. WAUGH.

Deposition taken at Detroit, Michigan, March 17, 1933.

DIRECT EXAMINATION.

The Witness: I am a housewife, with one child. I am a user of Kellogg's Whole Wheat Biscuit. I have used Kellogg's for years and years. I have used their Whole Wheat Biscuit for the last year. A friend of mine asked me if I had tried the toasted biscuit. I asked for it the next time I went to the store; Kellogg's toasted biscuit. That was like Plaintiff's Exhibit 159. I liked it. I had used the other biscuit, Niagara shredded wheat, lots of times, many years ago. As compared wan it, I liked Kellogg's biscuit better, because it seemed browner and more toasted. I liked the size of it better, because I do not have so much left over. It takes the biscuit with cream. If you want another, you can have it. One is usually the right amount.

I came here to testify because one of the salesmen came to our house and asked me if I would come down. I did not know him before.

CBOSS-EXAMINATION.

THE WITNESS: He did not even know my name when he came to the door. He asked me if I used Kellogg's biscuit and if I would mind testifying. He assured me there would be nothing to it if I would just

CHARLES E. DENISON.

Deposition taken at Syracuse, New York, March 20, 1933.

DIRECT EXAMINATION.

THE WITHERS: I am thirty-nine, a storekeeper, owning my own store. I have been in the general grocery business about ten and a half years. I have owned the property two and a half years, rented it before that. I have a general grocery, post office, hardware, drugs, dry goods and like that. I have a delivery service with two trucks, and a pleasure car we use taking orders. There are three on the road most of the time. We take orders one day and deliver another. On a small route, we will take orders in the morning and deliver in the afternoon. Three-quarters of our business is done on the road and one-quarter in the store. On the road, our men take orders and deliver them at the houses. We have done that for years.

We handle Kellogg's Whole Wheat Biscuit, and have done so about since it has been on the market, three or four years; quite a while. There is a consumer demand for that product in my store. It sells right along. It is asked for as Whole Wheat Biscuit.

We also handle Niagara shredded wheat. It is generally asked for as shredded wheat. I believe the two products sell about the same in our store. Generally speaking, I think Kellogg's sells a little bit better. Over a period of time, they usually have more sales. They co-operate with us more than the shredded wheat folks do. Kellogg gives us agles lasting a week, because our routes take almost a week to cover. He lets us take two packages and give one free. We got rid of a dandy let at that time. Our own wagons help to make that sale. We have those specials for nearly every week, usually. We buy about five or six different articles in on specials, or we want to

close out seasonable things. We use specials every week. We sold Kellogg's Corn Flakes as a special last week. It just happened one jobber had a specially good profit on it. I co-operated with him and put a sale on. The Kellogg Company does some sampling through us, our trade being through the country. About half the trade is off side roads into the country from the state road between Troy and Schenectady. They will come along and sample the state road, and they will not touch the side roads. They usually leave the samples with me. Mr. Niederman is nice about it. He knows my class of trade and, if he leaves me the samples. I will give them out. He usually co-operates and leaves them with me. I put them in the orders and see they get them. I usually get good results from samples.

Sometimes they bring them in and ask us to prepare the samples, but sometimes they are prepared by Kellogg. We have about three hundred customers and usually try to get enough a mples for all. We regard

that as co-operation from the manufacturer.

Both products are right on the shelf, along with the other cereals. Kellogg's is on one shelf, and shredded wheat is just above it, on the next shelf. Cereals are all in one section. The shelf just fits one package. I usually have the same type of goods along-side each other, like Cream of Wheat and Wheatena. On the top shelf I have Corn Flakes and Post Toasties. It happens the shelves are not all the same size. We have to have Kellogg's on one and shredded wheat on the next shelf up.

Since the Kellogg Company has been in the field with Whole Wheat Biscuit, I should not think I have noticed any falling off in the general demand for shredded wheat and Kellogg's combined. I should think it would be a little bit more, if anything, because we have had quite, a few sales. I think more wheat

biscuits of Kellogg's or shredded wheat are sold than there were heretofore. Sometimes folks will buy Kellogg's biscuit and will then go back to shredded wheat, if they have used it for years. I have some customers do that. Sometimes, they will continue to use Kellogg's Whole Wheat. I know there is more of that type of goods sold. There cannot help but be, when you are pounding samples and sales onto them.

CROSS-EXAMINATION.

THE WITNESS: I cannot say that a considerable > portion of the distribution enjoyed by Kellogg's Biscuit now is at the expense of Shredded Wheat. Naturally, they are trying to sell their product. Possibly it has detracted from the sale of shredded wheat in a few cases. I would not say at all that all the business which Kellogg enjoys on its Whole Wheat Biscuit is new consumers, who had never eaten it before. Some of our customers who have been users and buyers of shredded wheat will buy Kellogg's, and some of them will stay with it. Some of them will go back to shredded wheat. It is possible that Kellogg's Whole Wheat Biscuit, which looks like shredded wheat, occupies some of the field which was formerly occupied by shredded wheat. I have known this shredded wheat, like Plaintiff's Exhibit 1, ever since I have been in business. I recognize the package. The biscuit has always been about the same as it is today. For many years, it was the only biscuit of that kind; and it became a very well-known product. It was always a very good seller, but not as much as some cereals, and it was always known by the expression "shredded wheat," Since the Kellogg biscuit came on the market, I think the general consumption of that particular type of product, taking both as a whole, has increased. This co-operation I get from the Kellogg Company is

something I would naturally expect when they are bringing out something new; but most manufacturers do not continue to co-operate with you quite as much as they do on their cereal line. They are quite aggressive and push hard on all their cereal line. I do not believe their aggression is particularly strong on Whole Wheat Biscuit, because we have had other sales on other products, like Corn Flakes and Pep. We

have had campaigns on their other products.

I think the last samples they gave us were the large package. We sold two for nineteen and gave one free, within the last two months. We possibly sold some to people who had been using shredded wheat; not a lot of it; because we deal with a few people who buy shredded wheat only and who never buy anything else. People buy it occasionally when there is a sale and probably go back to the other. I guess there was a time when they used the small packages for samples. It seems to me I can place that small package, with two biscuit. I know we had the small package of other cereals at times. Defendant's Exhibit 70 is the package I had in mind. I think I had some. It might have been one with one biscuit. That seems a little bigger than the one I had. I may be thinking of some other cereals. Pep and other things are about half that size. Maybe I had the wheat biscuit in envelopes, I think marked Kellogg's. The only packages, I guess, were like Pep and those things. I do not recall that one. It seems to be thicker than the samples I had.

Shredded wheat has had very little sampling campaigns. I have known that shredded wheat has been sampled from house to house; but I do not know that they co-operated through me. If they have, it has been

quite a little while ago.

I know that shredded wheat has been advertised quite extensively through the years and that created

a large consumer demand for its product. We have a great many customers who always buy shredded wheat and do not take anything else. I would not say a great many. I have some customers who take only shredded wheat; but I cannot say a great many, because there are not enough who buy it. A case does me about a week, so I would not call it a great many. There are thirty-six packages to a case.

We have, for some time, sold Kellogg's a cent cheaper than shredded wheat. Sometimes the boys will mention that, if they prefer it. If you know your customer and she asks for shredded wheat, you put down shredded wheat. After so many years acquaintance with your customers, you cannot put down one thing when she asks for the other. I pretty nearly know their wants. Sometimes my clerks say it is a cent cheaper. That sometimes helps to sell it. I always try to work . r the interest of my customers. I have made a lot of friends. I can make as much selling it at eleven cents as I do Shredded Wheat at twelve. For a couple of months we sold two for nineteen and got quite a bit of selling, on Kellogg's.

RE-DIRECT EXAMINATION.

THE WITNESS: As I said in connection with having my boys tell them Kellogg's is a cent less, I try to work for my customers. I mean I regard that as a benefit to the customer, to tell her she can get the product for a cent less. I never inferred, to my knowledge, that one was any better than the other. I do not know the boys ever have. When we have sales, we drive what we are selling. The price being a cent cheaper, we co-operate and are getting pretty good distribution on it. I consider it perfectly legitimate to have my boys say they can have another product a cent cheaper. I am looking to the interest of the customers, if they can buy a product somewhat similar for the same price.

Deposition of Charles E. Denison

RE-CROSS-EXAMINATION.

THE WITNESS: The products are similar.

RE-DIRECT EXAMINATION.

THE WITNESS: Kellogg's biscuit is a shredded biscuit, just as much a shredded biscuit, I think, as the other one; not quite as large but about the same total weight in the boxes, more of the biscuits in the box. I know what my enstomers want and invariably give it to them. Most usually, having dealt so many years with them, if they ask for a certain kind of soap, you do not give them something else. If a customer asks for shredded wheat, she gets the Niagara product. If they ask for Kellogg's shredded wheat, we give them Kellogg's. "Kell. W. Bis." is the way we get our orders on them. On the other we say "S. W." I have heard them say they want the other Shredded Wheat made by Kellogg. It is no fault of ours that they ask for it. I try to mention Whole Wheat Biscuit; but it is shredded wheat.

I do not know that I have had any confusion between those two products. Usually, if the word is split like that, we make sure what they want when we send it. When you go around to customers out in the country, you want your orders pretty nearly right. If we send them something not ordered, it means a trip of a mile or so to rectify it, which does not pay.

RE-CROSS-EXAMINATION.

THE WITNESS: I called Kellogg's biscuit shredded wheat so promptly because I think it is shredded wheat. It is wheat biscuit and shredded similar to Shredded Wheat. I called it shredded biscuit or shredded wheat right away, because it is shredded biscuit. We are just talking shredded wheat here. When you come into a store where there are thirty different cereals, shredded

wheat is only one of Kellogg's, whereas here, we are speaking of only shredded wheat biscuit. When I have a biscuit like Kellogg's and am asked to describe it, the only thing I can think of to call it is shredded wheat biscuit. It is shredded biscuit.

BXQ. 94. You call it shredded biscuit; and the only reason you call it shredded wheat biscuit is because it is like that biscuit that you have known for some twenty years that is called shredded wheat; is that right?

A. Well, yes, that is a reason.

The Witness: I can think of another designation. We call them Whole Wheat. I do not know that I have ever speken of it as Kellogg's shredded wheat biscuit. I will admit our customers sometimes do; but we call it Kellogg's Whole Wheat, and they will say shredded wheat made by Kellogg. That is so rare it is not worth speaking of. In my experience, they invariably ask for Whole Wheat Biscuit.

When Mr. Clarke asked me what kind of biscuit it was, I immediately said it is shredded wheat biscuit; and it is. I would not call it shredded wheat biscuit, because that is the name of your biscuit; but I would call it shredded biscuit. Shredded wheat is the name that the National product has always been known by. The National product is shredded wheat. It is possible to speak of Kellogg's as shredded wheat; but usually, they want Kellogg's Whole Wheat or Kellogg's shredded biscuit. They speak of the latter as much as the first.

When the Shredded Wheat Company or whoever originated this biscuit put it out, I believe there was nothing anywhere like it, then; because I was in business some time before I started getting Kellogg's. I do not know just how long ago it was. I have not the least idea how long shredded wheat has been on the market. I know it has been ever since I have been in

business; and I know it was always known as that product. It was always called shredded wheat. When anybody sees a biscuit made in the same manner, I do not know there is anything else you could call it. That is a shredded biscuit. I do not know that the boxes resemble each other. There is some resemblance when you go into detail.

RE-DIRECT EXAMINATION.

THE WITNESS: As a dealer, I find no confusion between the two products. If we are not sure of it when the customer asks one time, we ask a second time. There is no need for confusion.

RE-CROSS-EXAMINATION.

THE WITNESS: As far as I am concerned, there is no confusion between the two. I am satisfied they are made up in the two boxes with enough difference so I can sell them and not be confused.

BUBTON A. MILLER.

Deposition taken at Syracuse, New York, March 20, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am treasurer of the Hudson Food Products Company, a chain grocery store organization with twenty-one stores located at Schenectady, Saratoga, Glens Falls, Hudson Galls, Schuylerville, South Glens Falls, Altamont, and Scotia. I guess that covers them. They are not self-service stores. As a chain, they run combined newspaper advertisements and make window displays in connection therewith.

Our stores handle Kellogg's Whole Wheat Biscuit. I think Plaintiff's Exhibit 167 is the package.

We have no packages with cellophane fronts. I have not seen any yet. They might have gone through without my noticing, however.

There is a consumer demand for Kellogg's Whole Wheat Biscuit in our stores. It is asked for as Whole Wheat. We also handle the other product. Niagara shredded wheat, which is asked for as shredded wheat. There is no confusion between those products, to my knowledge. I have heard no complaint about it; and I have not heard of anybody returning any. As a rough estimate, I would say we sell about one-third as many Kellogg's biscuit as we do of shredded wheat. We advertise the product and various other Kellogg items. We have advertised it as Kellogg's Whole Wheat Biscuit. When we advertise it, we invariably give window displays on it. At times we make specials of some Kellogg items. There may be advertising on those items. You have six of them. We make a window display. Some of them you can and some you cannot. On the large packages, we make a display on the floor. Our window displays are our specials for that week. We have done that with Kellogg's Whole Wheat Biscuit. I know Kellogg's have also worked on it to create consumer demand. Samples have been sent around from time to time, and there has been newspaper advertising on Kellogg's Whole Wheat Biscuit, and Kellogg products.

The demand for Kellogg's biscuit in the last year has been slightly increasing. It is hard to say whether other cereals cut into the sales of shredded wheat and Kellogg's Whole Wheat. That is a new product, selling pretty rapidly. What cereal that particular product has been eating into I do not know. I know Shredded Wheat have not been as good as they were. I have not checked up to see what cereals they were eating into most; but other cereals of that kind are eating into the sale of other cereals.

We do not get from the National Biscuit Company as much co-operation in creating consumer demand for the product as we do from the Kellogg Company, which gives us more co-operation. We do not bandle the rest of the National Biscuit line the cracker line. We just handle shredded wheat and the dog biscuits. We handle the whole Kellogg line of cereals. I cannot say now whether we get the the regular seventeen and a half per cent, discount on our purchases of shredded wheat. I do not know. I think we are, but I am not positive. I have not been doing the buying for some time. We buy the National shredded wheat from the National Biscuit Company. Kellogg biscuit is bought direct from the Kellogg Company. Generally speaking, on cereals, we do not deal with jobbers but all direct. The National happens to be in the same block with us. When we want their merchandise, we go over and get it. We do not handle the general cracker line of the National Biscuit Com, any.

We have Friday and Saturday specials of Kellogg. We advertise Thursday night and Friday morning for the Friday and Saturday business. Generally speaking, it is half the week's business. The displays are in the whole week. I think we had some Kellogg demonstrations years ago, but not recently, as I recall.

CROSS-EXAMINATION.

THE WITNESS: We advertise in three newspapers and we carry in those advertisements the usual Kellogg items. We do not advertise Shredded Wheat any more. We used to. When we carried Shredded Wheat, there was no other cereal in our store like it, because Shredded Wheat at that time was being featured by others at a below-cost price. Some of our managers thought we had to feature Shredded Wheat to meet competition. We thought that was error. Some five

1492 Deposition of Charles Conrad Braunhardt

CHARLES CONBAD BRAUNHARDT.

Deposition taken at Syracuse, New York, March 20, 1933.

DIRECT EXAMINATION.

THE WITKESS: I am forty-eight, a grocery man, owning my own meat and grocery business, but not the building, consisting of two stores with a partition between, meat on one side and groceries on the other. I conduct both stores. I am a member of the Buy-Rite Stores, Inc., with twenty-two member stores, and of the Meat Dealers and Grocers Association, of Troy, New York, which has about two hundred stores. I would call them both voluntary chains. I have knowledge of the business of the members of the voluntary chains as well as my own stores. I am quite sure I know the products they carry.

I handle Kellogg's Whole Wheat Biscuit. It is carried by all the Buy-Rite Stores. I do not get over to Troy, to all the stores; but I am quite sure the stores of the Meat Dealers and Grocers Association also handle it, because the warehouse has it in. I am sure the Buy-Rite stores carry it and know the Meat Dealers have it stocked in their warehouse. I have carried Kellogg's Whole Wheat Biscuit since it first came out. several years ago. There is a consumer demand for it in my store. They ask for Kellogg's Whole Wheat Biscuit. Sometimes they call it Kellogg's shredded wheat product. When they ask for that, I give them Kellogg's. It looks like shredded wheat. It is a little smaller, as far as I know. I have never eaten any. I do not know what grain it is made of. It is supposed to be a wheat product. It is marked on the package. I handle the shredded wheat with the picture of Niagara Falls on the package. I have carried it ever since I have been in business. I have no confusion in my store between the two products. Customers ask for the Niagara Falls product as Shredded Wheat.

My store is a service store, having telephone orders and making deliveries. On the telephone orders just come for shredded wheat as shredded wheat. For Kellogg's, they come as Kellogg's Whole Wheat or Kellogg's shredded wheat. I never had any trouble with confusion between them.

When Kellogg's first came around, I had window displays to help create a demand for Kellogg's biscuit. That is about all. And I put a price on it. The Buy-Rite and Meat Dealers and Grocers Association probably had advertisements; but I could not swear to that.

There is a fair demand for Kellogg's biscuit in our store. It is now moving better than it ever did, with me. In the last year, the demand has been increasing. I handle Kellogg's in a package like Plaintiff's Exhibit 167. I do not handle Kellogg's biscuit in packages with a cellophane front. I have never seen them. The last case of shredded wheat I got in looked like the new package. Plaintiff's Exhibit 148.

I buy Kellogg's Whole Wheat Biscuit through the Buy-Rite organization. The Kellogg salesmen come to our store, look over the stock and see how the goods are, inquiring whether we want any changes. They keep an eye on the stock and see whether it is fresh, replacing any that is not. I buy my Niagara shredded wheat a case at a time from the National Biscuit Company. I handle the rest of the National Biscuit cracker line. I get a seventeen and a half per cent. discount, if I buy on orders of more than a hundred dollars a month, presumably, because I think it is all figured in on the voluntary chain. If we would just get shredded wheat, I could not say how much the discount would be.

CROSS-EXAMINATION.

THE WITNESS: I have handled shredded wheat ever since I have been in business. I have always handled shredded wheat, in a package like Plaintiff's Exhibit 1,

and now, Plaintiff's Exhibit 148. I have always known it as shredded wheat. I have been in business about sixteen or seventeen years. It is safe to say I knew shredded wheat before that. I have seen it in grocery store windows. It is a very old product, the first product of that particular kind that was on the market. I know the Shredded Wheat Company has spont a great deal of money in advertising the product and making the public familiar with it as a new kind of food. I have seen it advertised. My customers have asked for it a great many years as shredded wheat.

To me, Kellogg's Whole Wheat Biscuit looks like shredded wheat. It does sometimes to my customers, too. I could sell the Kellogg product to fill the same want that shredded wheat fills. You could move either

one, I presume.

I do not know of any confusion between the two, in my store. I have no difficulty in keeping the two packages apart. I give the customers what 'hey say. If they ask for Kellogg's, I give them Kellogg's. Sometimes they look at the packages, see fifteen biscuits, and you know what people are nowadays. The pennies count. They see the picture of the two biscuit on the package, and sometimes they say they will try it.

I never noticed the picture on the back of the package, as in Plaintiff's Exhibit 148, as long as I have been handling it. All I am familiar with is the label; that is, the side with the picture of the factory on it and Niagara Falls there. I do not even know what is on the back, because I never eat it. I do not use either one myself.

I see Plaintiff's Exhibit 10, with the picture of the factory on the front. That was the old package. I do not recall the picture of the biscuit on one end instead of Niagara Falls.

In the last year, the consumer demand for Kellogg's biscuit has increased with me. I will sell three

of shredded wheat to one of Kellogg's biscuit: I have had Kellogg's, I think, for ten cents at one time. We cut shredded wheat with the chain store. When they make it nine and a half cents, we do, also. When they have it ten, we have it ten. We are enabled to do that through our voluntary chain. We sell Kellogg's for eleven cents, ordinarily.

RE-DIRECT EXAMINATION,

The Witness: I sell the Niagara shredded wheat for eleven cents, and ten cents cash. Customers sometimes notice Kellogg's package and ask for that when they see the number of the biscuit. We have never done anything to create a consumer demand, other than the window display. I never had it on any hand bills, because I do not do that. I could not truthfully say whether the two biscuit are the same size. I am not a user of shredded wheat. I have never seen it out of the package.

We have had Niagara shredded wheat, I am quite sure, on advertising, as low as nine and a half cents. We have run cut sales on the Niagara as well as on the Kellogg; but Niagara shredded wheat has been advertised at some times at cut price, to my knowledge, which is a device for calling the product to the attention of the consumer. When people come into the store, nowadays, some can remember a difference in price, if it is only a penny. You cannot do that any more nowadays. The chain stores have got that all fixed. The price cutting is to meet chain store competition. We do not want to do it, but we have to.

During this controversy, there was a time when we cut out shredded wheat altogether and entirely. That was before we went with the L G. A., when we had the general grocery store business. We were not carrying shredded wheat at that time, but only the Kellogg product. When we were asked for shredded wheat then, I told them the same thing, that we have not got or do not carry the National shredded wheat, that all we carry is Kellogg's.

People do not usually ask for Niagara Falls shredded wheat. They ask for shredded wheat, and we give them this. I absolutely agard the Kellogg product as filling the same want as shredded wheat. If I received an order then for shredded wheat, I asked them first. We gave them a chance to decide which they wished. I told them we did not have it, that, if they wanted Kellogg's, they could have it. I know of but very few instances where they refused to accept Kellogg's.

We do not deal with the State, just county institutions. Down our way, they do not buy on competitive bidding, do not issue specifications of what they want. The dietitian buys it in the Cortland County Hospital. I settle it on the phone. She calls up and buys Kellogg's, because there are more servings to the package. She can get a package of Kellogg's and serve fifteen instead of twelve, which evidently appeals to her idea of economy. She buys Kellogg's and insists upon it. We have specifications which come in for us to bid on, but we do not bid on them. I should imagine we do sell shredded wheat to some institutions. I know we do to the larger hotels. I have sold shredded wheat in a package like Plaintiff's Exhibit 1, for a great many years, with the exception of eighteen months or so. We are selling it now. We buy it in small quantities from the National. We had a car

at one time. After that, we bought it in shipments of fifty cases, or a hundred cases for hot weather purposes. I buy possibly twenty-five case lots for the small orders.

We sell the product to hospitals in large packages. I think it is fair to say that about half the restaurants buy the small individual packages and half of them the large packages. There are possibly thirty restaurants in this county. A lot of them we do not now service because of the times. I assume we service thirty at present, not including hotels, but there would be only a few hotels. I presume that would be a third of the total field. We are pretty stiff on credits now.

I have been in business thirty years the fifth of last January. During that time I have known shredded wheat, except about the last eighteen months. But during all that time I have known of it and heard of it. It has been a well-known product. We favored it until the National took hold of it. I was a good, strong shredded wheat fan until the National got it, after which there was some trouble. Shredded wheat was acgood seller in proportion to other business. There was a constant demand for it. It is safe to say there is for both of them today. I think there is no doubt about the Kellogg product having gotten some of the trade that shredded wheat formerly had. There is no doubt that it has encroached somewhat on the shredded wheat business, substantially so because we favor it and we are pushing it.

RE-DIRECT EXAMINATION.

THE WITNESS: All competitors take every field they consider good. We consider the Kellogg Company better in their business methods. We thought it decidedly a life saver for the Kellogg Company to

bring out that product at that time. I do not know that I have followed the nee of the individual cartons in restaurants in this district. I am not sure of the proportion. If both the National and Kellogy should express a desire to have the restaurant trade serviced as much as possible in individual cartons, I would be willing to co-operate; but I would not favor the National Biscuit Company at all. We would co-operate with the Kellogg people. We would not co-operate with the National Biscuit Company. I am the man who would have the say of it. I have never had a word from the National asking me to try to push the restaurant trade in the big packages. I do carry the Kellogg individual cartons for the restaurant trade. I know I can get as many of them from Kellogg as I want. I never dreamed of anything else. I would have no objection to having whatever check can be made to find out what the proportion is.

Shredded wheat was used as an inducement or lever to get our I. G. A. stores to handle the National line. They used all the pressure they could to get us to put their line in. They came as many as three in a line to see if we would sanction the sale of the National line in our stores. They showed us a pretty picture of what you can get by 15 per cent., which they raised finally to 17½, the same as the chain store was getting, quite an inducement to our stores to put the full line in. No threat was made in those negotiations to make us handle shredded wheat in order to handle the cracker line. I do not think we were handling it at that time, seventeen or eighteen months ago. The Kellogg product was then on the market and we knew of it.

RDQ. 140. Do you think that you would have been able to throw out the Niagara shredded wheat if the Kellogg product had not been on the market?

A. No, sir, we had to have a shredded wheat.

THE WITHERS: We would have to have a competitive line to keep from being squeezed. That is what forced us to go back to the National. We took something that was not theirs, and they were not in our picture. We went back at the National until we got them to our way of seeing the picture. We used them as a football, the same as they would if the shoe was on the other foot.

RE-CROSS-EXAMINATION.

THE WITHES: We took on these other stores and gave them shredded wheat, as I call it, with the hope that, after we got them in the fold, we could convert them to Kellogg's. We have not tried it lately as much as we could. The idea was we could give them National shredded wheat at a competitive price, so we do not care which we handle. There was nothing by way of a threat to induce us to take on the other lime. but they tried to show us figures and asked pasto take their line, the same as I would do in selling anything. There was nothing unethical about that. The unethical part I referred to was about discounts. There was a big controversy between the chains and the independent grocers. That is all there was to it. That has been for some years, as long as I have been on the I. G. A. and a little longer. Concerns like the I. G. A. really have as their basis the fight of the independent against the chain stores. They attempt to give the independents the advantages enjoyed by the chain stores. That is their purpose.

RE-DIRECT EXAMINATION.

THE WITNESS: None of the conversion of customers from Niagara shredded wheat to Kellogg's has been done by substitution. We have never substituted. We just submit the name and brand they want.

It is regarded as perfectly legitimate for a grocer to introduce a new product to his trade, absolutely, to try to get him to use a new product. At the time we were making such converts, the Kellogg Company was not merchandising samples of Whole Wheat Biscuit to customers. We have never made any direct drive. It was not a mat'r of converting people from one to the other. I simply discontinued the National biscuit. If they wanted shredded wheat, we told them all we had was Kellogg's. The Kellogg Company have sampled the section and they gave week-end demonstrations in the stores.

Ra-Choos-Exampleation.

THE WITTERS: Our merchants include those who have to live, these days, and they have to have what they want. Taking the word substitution in its proper meaning, without any unethical association, the Kellogg biscuit will not fill the same demand that shredded wheat does, if the customer insists on one brand. If he calls for shredded wheat and we do not have it but can give them Kellogg's biscuit, we can give them shredded wheat. We consider them both shredded wheat. In that sense, we can use them both to fill the same want.

BE-DIRECT EXAMINATION.

The Wirkes: We consider them both the same product. There are more biscuit in a package of Kellogg's than in the National. We do not handle Wheaties for the same reason. We have no Gold Medal products in our place, because we consider greater discounts to chains than to independents unethical. We cut them out. That is absolutely discount or price discrimination. Rebate in any form is price discrimination, whether it be advertising or what. It is discrimination as to buying goods.

RE-CROSS-EXAMINATION.

The Wirkes: The Kellogg Company does not give us a penny of advertising allowances. We have to pay it ourselves. We are glad to do it. We are fighting for the independent to live, and he is going to live.

ABRAHAM P. DEWOLF.

Deposition taken at Syracuse, New York, March 20, 1933.

DIRECT EXAMINATION.

The Witness: I am a grocer and have been in the retail grocery business about thirty years. I have my own store; did have two, but eliminated one last year. I could be described as an independent grocer. I am not affiliated with any voluntary chain. I am a member of the Board of Directors of the Rochester Grocery Company, a wholesale grocery owned by retailers, about twenty-five or thirty of us. We buy most of our supplies there.

We handle Kellogg's Whole Wheat Biscuit, like Plaintiff's Exhibit 167. I do not know that I have ever handled any with the cellophane front, like Plaintiff's Exhibit 161. I might have seen such a package, but I would not remember. I could not say exactly how long we have handled Kellogg's biscuit, but about two and a half years. There is a consumer demand for it in our procery. Customers come in and ask for it, as Kellogg's shredded wheat biscuit. We created a demand for it.

We also handle the other shredded wheat product, National shredded wheat, but not a great deal. We got in some difficulties with the National in Rochester and cut down on their goods. For two years, we have not handled a National cracker. They used to have all our business. After some discount disputes in Rochester with the Grocers Association, they cut out all the National product. The dispute with National was on crackers. After the National took over the Shredded Wheat Company, they got into the same dispute, so we naturally barred them all as much as we could.

That dispute was over the discount as between chain stores and independents. That time, the small independents got five per cent., the big independent about ten per cent. I got about twelve and a half. The chain stores were getting seventeen and a half. I happened to be on that committee. We threshed it out with a gentleman from Buffalo and somewhere else. We had several arguments on that. They finally came across, and I guess they still are coming. I understand they gave seventeen and a half to everybody. National Biscuit Company products were out of my store for two years, altogether. When they took over Shredded Wheat, with the feeling we had toward National, we put their stuff in the back room. When people insisted on taking it, they got it. If we could sell them something else, that was our business. When people asked for shredded wheat, we would give it to them, put the two packages on the counter, and try to sell them the other package. We put out the Kellogg package and the Niagara package and explained Kellogg's had two or three more biscuit, were of fine quality, etc. I did not regard that as unethical in any way, with the feeling I had toward the National. I felt I had a perfect right to do that. As a matter of fact, grocers have a perfect right to tell their customers about new products they have. We can recommend anything we wish to. We bought the goods and paid for them. We can push one article if we want to. That is normal.

The dispute with the National was generally known in Rochester. Our customers work with us. A good many customers feel the same way we do. They

thought it was unfair, when we explained to them about the discriminatory discounts. Most of the customers co-operated with us. Some of them would not. If they insisted upon a certain brand, they got it. We do that with coffee. If a man asks for coffee which is kicked around as a football and we do not make much money on, our coffee is introduced, and we try to sell it to him and convince him. We do that with all our goods, tell him about the other product and try to sell it to him.

The Kellogg Company advertise Whole Wheat Biscuit, and they have sampled it in our neighborhood several times. I think. We have several times given the product window and store displays. That is done with the idea of calling the customers' attention to the product. I think we have a sale today of three packages, at a certain price, one of Whole Wheat, one of Corn Flakes, and a third of some other product. The customer buys that by paying for two of the packages and receiving the other free. I know Whole Wheat Biscuit is one of the elements of the combination. Of the two products. I think Kellogg's sells the most in . my store now. We have never had any Kellogg's biscuit returned. There is no confusion between the two products. We do not send it out now. We do quite a telephone business. If people ask for it, we never send it out without explaining it is Kellogg's. We never try to force anything. Good grocers know they cannot get away with trying to force things. It makes dissafisfied customerc. Kellogg's outsells the National shredded wheat.

CROSS-EXAMINATION.

THE WITNESS: Rochester was probably the center of this storm about discounts. That is where the trouble started. That storm is clearing up now. They handle some National products now. We cleared that up with the understanding with National, that they

must create a demand for their goods. We left the opening that we were not in any way compelled to do so. If they could get back, they could do so. They are getting some stuff in my store now. The National does do some things to create demand. We keep on a friendly basis. They advertise, and they service our store and have demonstrations from time to time. Since they got back, I have had no demonstrations on them. I am handling shredded wheat now. Although I cut it out, I had some shredded wheat in my store always, but I did not push it. I had some customers who insisted upon it. There are always some to whom we could not sell the Kellogg biscuit. We did not put up any argument or force it. We merely worked it, put it in the background and worked on Kellogg's biscuit.

If we had not had Kellogg's biscuit then, I do not know that we would have had to keep the shredded wheat in front. In Rochester, when we work against a thing, we work against it. We have a lot to fight against. For instance, you have to look under the counter to find Chase & Sanborn Coffee. If somebody wants it, we reach down behind the counter, get it, and are nice about it. That is what we did about shredded wheat. If we had not had Kellogg's biscuit, we would have had to have had shredded wheat, if we did not have a substitute. That would be true, if we had nothing but this package. If we did not have a substitute we would have to have that. I have been in business thirty years. I have known shredded wheat during that time and at least that long. I have sold it for that number of years. It has always been sold in a package something like Plaintiff's Exhibit 1. It has always been known as shredded wheat and has always been about the same sort of biscuit. As a matter of fact, it has been a very well known product for many years and has always been asked for as shredded wheat. Sometimes my customers ask for Kellogg's biscuits. I do

not know that they sometimes ask for Kellogg's shredded wheat. We carry it as Whole Wheat Biscuit. If a customer asked on the phone for Kellogg's shredded wheat, I would send her that. Whatever they

say goes.

If, during the time we were keeping it in the back room, a customer asked for shredded wheat, I would try to get her to take Kellogg's Whole Wheat Biscuit. I was successful in that. Through those means and other means adopted by the Kellogg Company, they have. I suppose, increased their use of that product here in the Rochester territory very considerably. I do not know anything about their business. Kellogg's Whole Wheat is selling a little ahead of shredded wheat, has been, with us, within the last couple of years. Before we had gotten into that fight, I had never seen Kellogg's biscuit. I think they came out about that time. They were not out very long before we got into this muss. We used Kellogg's product, to be frank with you, as more or less of a life-saver during that rumpus.

RE-DIRECT EXAMINATION.

THE WITNESS: This fight about price and discount discrimination was not confined to the City of Rochester, but it originated there. That is where the grocers got their backs up. I suppose the same form of discount was current around the country, because we started out and formed the Civic Defense League, got it up into Albany and all sorts of different places. We heard from them the discounts were about the same after we got to the meeting.

RE-CROSS-EXAMINATION.

THE WITNESS: Some of our customers sympathized with our position after it was explained to them. Some of them, of course, did not. The National did plenty of advertising on their side. As far as the customer was

or six years ago, we pushed Shredded Wheat before the National Biscuit Company owned it. At that time, I was buying through the Shredded Wheat Company office at Syracuse, their representative here. It came in pool cars through a representative in Syracuse. Since the National Biscuit Company took over shredded wheat, we have secured our supplies direct from them as we needed them; but we have not pushed it or made any special effort to sell it. Nevertheless, it does move. There is a well-defined consumer demand for shredded wheat and has been for many years, to the best of my knowledge, ever since I have been in business. It has always been a well-known product, sold in packages like Plaintiff's Exhibit 1.

We have had no controversy or difference with the National preventing our carrying their product now. We merely have always carried the cracker line of some other concern. We made connections with Sunshine, who gave us a lot of co-operation, and we have never changed. It is the same with many other lines. We carry one line and do not like to put in lines of two different competing companies. I think we get better results if we keep just one. Nevertheless, in this instance, we have both Shredded Wheat and Kellogg's biscuit.

I have been carrying shredded wheat because there is a demand. Otherwise, we would not carry it. If there was a consumer demand, we would carry it. I have never had any demand for Uneeda Biscuit. I have never found it necessary to carry Uneeda Biscuit or Nabiscos or other National products of that sort. We have carried the competitive lines in Loose Wiles. I have been stocking Kellogg's Whole Wheat Biscuit since about the first time it came on the market, four or five years ago, or maybe three. When it first came on the market, it was sold, to my knowledge, as Whole Wheat Biscuit. I recall packages like Plain-

tiff's Exhibit 165. I carried it when it was in that nackage, called Shredded Whole Wheat Biscuit.

When I told Mr. Clarke there is no confusion in iny stores, as far as I know, my thought was that we never had a customer bring it back and say it was the wrong package. When a customer asks for Shredded Wheat, she gets Plaintiff's Exhibit 1, the original shredded wheat. When she asks for Kellogg's Whole Wheat Biscuit, she gets it. We make no confusion or substitution of one for the other. I am not in the store, but I have not fait and it reported that a customer ever came in and asked for Kellogg's shredded wheat. I am general manager of the stores but I am very seldom in direct contact with customers. I get around occasionally but have never heard that.

The Kellogg Company, as far as my experience indicates, has been more aggressive in pushing its Whole Wheat Biscuit and all its products in recent years than has the Shredded Wheat Company. They have given us co-operation in all lines including their shredded wheat. I would not say shredded wheat is not a widely-advertised product. It is widely advertised and well

ARTHUR J. TWENTYMAN.

Deposition taken at Syracuse, New York, March 20, 1933.

DIRECT, EXAMINATION.

THE WITNESS: I am a wholesale grocer, with F. H. Cobb Company, which is a supply depot for the Independent Grocers Alliance a chain of ninety stores in seven counties, Courtland County being the main county. The Cobb Company also gives wholesale service to other independents. Half our business is that.

We carry Kellogg's Whole Wheat Biscuit and service it to all stores and institutions. It also goes

known.

to our independent customers. We also handle Niagara shredded wheat. We did have confusion between those two products and cut out the National shredded wheat for eighteen months about eighteen months ago. because we considered the way they were doing business unethical. We have never had any grocers return either one product or the other. We put shredded wheat in again later on. There is a continuing demand from our retailers for Kellogg's biscuit, I have knowledge of how it is merchandised in L. G. A. stores. It is advertised to the consumers in those stores and they use store displays of the product. The Kellogg Company co-operates in creating consumer demand for it by sampling and by Saturday afternoon specials in their whole line. They had demonstrations not very long ago.

The Cobb Company also services Whole Wheat Biscuit to institutions, leading hotels, the Cortland County Hospital, also to county houses. The Cortland County Hospital insists on Kellogg's shredded wheat, because, they say, there are more servings to the package. There is a consumer demand for Kellogg's biscuit among hotels. We service all the restaurants in our section where the credit is O. K. We service them with Whole Wheat Biscuit in individuals, and sometimes in the original package, like Plaintiff's Exhibit 167, which I imagine is more economical or they get service right from the package. Generally the larger restaurants buy the large package. I think the restaurant demand is about fifty-fifty for the individuals and the large package, in my territory.

All our stores do not handle Niagara Falls Shredded Wheat in the I. G. A., as well as Kellogg's biscuit. Some of them do not handle shredded wheat, because of what they consider unethical business meth-

ods in the past. They simply will not handle it. The methods to which I refer relate to discounts.

A consumer will come in and ask for a package of shredded wheat. One of our customers was on the phone the other day. He said he tells them he just simply does not have Niagara, that he has Kellogg's and will give it to them.

Our I. G. A. stores do not give a deal on Kellogg's biscuit. We run it on our budget bills and windowsposters, and in our advertising. We give them window and store displays.

CROSS-EXAMINATION.

THE WITNESS: In this part of the State, within the last year or two, there was considerable controversy between the National Biscuit Company and the dealers over discounts. It got to the point where feeling ran pretty high in some sections, and the National did not fare very well for quite a while. While it is dying down, there is naturally still quite a bit of feeling among the dealers against the National, I would say, particularly the independents. That accounts for quite a number of them not handling National products now. That arose after the National Biscuit Company took over shredded wheat. Some white I. G. A. stores and perhaps other independent customers do not carry shredded wheat at all. In those instances, when a customer calls for shredded wheat, we ask her which brand she wishes. I said I recently learned from a grocer who did not handle the National that, when a customer asks for shredded wheat, he gives . them Kellogg's, simply stated he did not have the National, sent Kellogg's, and it was accepted by the customer, as far as I know. I do not know that of my own knowledge.

JOHN A. DIMALLIE.

Deposition taken at Syracuse, New York, March 20, 1933.

DIRECT EXAMINATION.

The Wirkings: I am a retail grocer, with only one store, located at 440 Parsalle Avenue, Rochester. I had that store for twenty-one years, except two years prior to last November that I was out of it. Since November I have been back. When I left, two years ago, I was not carrying Kellogg's Whole Wheat Biscuit. I do not know whether it was on the market then. When I came back, last November, I did not start putting it in, but I had calls asking me to put it in, and I did.

I also handle the Niagara Falls Shredded Wheat. The two products now sell about fifty-fifty in my store. The sales of the Kellogg biscuit must be growing faster than the other, because we started from nothing. That represents the consumer demand. I have not recently co-operated in any way with the Kellogg Company in introducing that product to the public. Simply the calls I had for it induced me to put it in.

I have never practiced substitution in regard to the Kellogg product. I do not see how it could be substituted for the Niagara Falls Shredded Wheat, because there is so much difference in the package. I do not believe you could substitute it, even to a child.

I procure my supplies of Kellogg's biscuit through the jobbers. I secure my Niagara Falls product directly from the National Biscuit Company. Consumers ask for Shredded Wheat or for Kellogg's Whole Wheat Biscuit. When they want the National product they call them shredded wheat; and the Kellogg product, Whole Wheat Biscuit.

I do not know of any sampling by the Kellogg Company in our neighborhood for the past six months. They have not given me any store cards or displays on Whole Wheat Biscuit since I have been back in business. Before, I had quite a little display work in the store, on other Kellogg products, but not the biscuit.

I give store and window displays to Kellogg's biscuit. I show no partiality that way. I give them to both. I think there is a shredded wheat display in my window now. I have all the different cereals in the window, those and others. I do not discriminate. If you looked in my window today you would see 'all kinds of cereals in it.

I was in Rochester when the Civic Defense League was formed. I have heard quite a bit of it. I was out of business then, but I attended several of the meetings. That concerned discounts, alleged discrimination against independent wholesalers, who were getting smaller discounts than he chain stores were getting. The dispute was entirely on discounts, the independent dealers claiming they were giving a large discount to the chains. We wanted the same discount and fought it out until we eventually received it. Today we are all getting the same discount, 17½ per cent., while before they were 15 per cent. on down, depending on your amount of business. I knew nothing at that time about the situation in Rochester.

CROSS-EXAMINATION.

THE WITNESS: I am entirely independent, not a member of any voluntary chain. I carry the National goods, and they give me the full discount. I am not now associated with any buying exchange or association. I have been connected with the grocery business all my life, heing born and brought up in it. During that period of time I have been familiar with shredded wheat and have visited their factory several times. I

carried it in a package like Plaintiff's Exhibit 1. Until the coming of the Kellogg biscuit, there was no other biscuit that competed with it directly for a great many years. When customers asked for it, they asked for shredded wheat. When they did I knew what they wanted and still do. There is no possibility of substituting one for the other in the packages. I would not say the biscuit resembled each other, except in color; not in size or amount. There is a difference in the number of biscuit in the package, and in the size. Aside from that, they both fill the same want, and I should say they looked a great deal alike. If I did not have shredded wheat in my store when they asked for it, I could say I had Whole Wheat Biscuit and might try to induce them to accept it instead. I might do that with almost anything, if I did not have what they asked for. I usually give people what they ask for.

If Kellogg's biscuit has grown from nothing in two or three years to selling fifty-fifty with shredded wheat biscuit, then Kellogg's must have, to some extent, supplanted shredded wheat with some of my customers. That is necessarily so. Some of my customers are now buying Kellogg's instead of shredded

wheat.

ALVA F. NORTH.

Deposition taken at Syracuse, New York, March 20, 1933.

DIRECT EXAMINATION.

The Witness: I am a grocer and have been a little less than five years this time, and two years at an earlier time, a total of seven years as a retail grocer. I am a member of the I. G. A., a voluntary chain, buying most of my supplies through our warehouse.

I deal with Brewster Gordon principally for odds and ends, and in the main I deal with the I. G. A. warehouse, which comes through Brewster Gordon.

I handle Kellogg's Whole Wheat Biscuit, such as Plaintiff's Exhibit 167. I have been handling it five years this coming nineteenth of July. I have handled it in cellophane-front packages, like Plaintiff's Exhibit 161. There is an increasing consumer demand in my

store for Kellogg's Whole Wheat Biscuit.

I also handle the Niagara Falls Biscuit. Kellogg's sells the most of the two in my store, better than twenty to one. I order Kellogg's biscuit usually about once every three or four weeks, in five-case lots, twenty-four packages to the case. I order the Niagara product whenever the stock is low, but I buy it in smaller quantities, nothing like as frequently as Kellogg's, and only when I need them.

The customers have become acquainted with the products, and they will discriminate between the two of them. A good many ask for a box of shredded wheat. If I am not well acquainted with the customer, I do not know whether he wants Kellogg's, and I will ask him whether he wants Kellogg's or the Niagara Falls biscuit. I will give him whichever he wants.

We have telephone orders in our store and handle them in practically the same way. I do not know that I ever have one product returned to me with the statement that the other was wanted. The customers know the difference between them. I have co-operated with the Kellogg Company by pushing this biscuit. I tell new customers about having it. I will give you an illustration of it. A lady has come in and told me she prefers the smaller size. Then I speak to them about Kellogg's Whole Wheat Biscuit, which is a smaller biscuit. I explain to them that there is a difference in the number of biscuit in the carton. The customers evidently prefer the smaller biscuit. I give

window, store and counter displays to Kellogg's biscuit. I put the Niagara Falls product on the shelf. Because I buy in smaller quantities, it does not make as big a display in the window. Sometimes I use Kellogg's Whole Wheat or any other cereal that may make a background for the window. I have put as high as ten cases of Kellogg's Whole Wheat Biscuit in the window. That has the effect of bringing the product to the attention of customers.

I was not a member of the Civic Defense League in Rochester. I attended the open meetings. It was a dispute between grocers and the National Biscuit Company and related to discounts on the entire line. I was not getting what I thought was right, and the competition of my chain store next door to me. I knew I could not sell the amount to get the big discount. The Ontario Biscuit Company did give me the discount, and naturally I swung. They gave me the same discount they gave to the chain stores, and I swung my customer over the other company.

CROSS-EXAMINATION.

THE WITEMS: I am only carrying the whole wheat biscuit and the Uneeda Biscuit of the National line now. I do not carry the full line. I carry Uneeda Biscuit because I have a demand for it. I also carry shredded wheat biscuit because I have a demand for it.

It is safe to say that I have always had shredded wheat biscuit like Plaintiff's Exhibit 1. I have known it for a great many years, more years than I have been in the grocery business. It is an old and well-known product. For many years in the grocery business, it was the only biscuit like that that we had, until Kellogg's product came on the market. During the controversy with the chain stores and National, we did not throw out shredded wheat altogether. We still have a considerable demand for it. I purchased

it from the cracker man that called on me at that time. I am able to make a better profit from Kellogg's Whole Wheat Biscuit than I am from the National shredded wheat. I have pushed Kellogg's biscuit in my store, so much so I now sell twenty packages of Kellogg's to one of the National. I could not say if that is representative of the sales of Kellog, 's biscuit in Bochester at the present time. I only know as far. as my own store is concerned, where it is selling now twenty to one. It is safe to say that, since Kellogg's biscuit came into the market in recent years, a great many who now buy it are former shredded wheat customers. When a customer calls me on the telephone or comes in, I call her attention to both biscuit and give her what she wants. Seventy per cent. of my trade take it off the shelves. We are not necessarily a self-serve store; but it is in such a position on the shelves that they can help themselves. If they ask for it. I ask them which one they want, Kellogg's or the National. I also give them a chance to take Kellogg's if they want it. It is somewhat to my advantage if they do take it. Some of my customers go to the shelves and select the shredded wheat biscuit. Probably 20 per cent. of my trade telephone their orders. On that trade, when an order comes for shredded wheat, my practice is invariably to give them a chance to get Whole Wheat Biscuit.

CLARENCE E. ALBERTS.

Deposition taken at Syracuse, New York, March 20, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am an electrical merchant and a user of Kellogg's Whole Wheat Biscuit. I buy it in a package like Plaintiff's Exhibit 167, the solid-front box. I have not yet bought any in a cellophane-front

box. I have been a consumer of Kellogg's biscuit about two and a half years. I saw it advertised. I have a youngster at the house, hard to please, like all youngsters. They eat certain things and get tired of them. We were trying to find something she would eat and like, saw the advertisement of Kellogg's biscuit liked it, and bought some. We at first had difficulty finding a place to buy it. We tried to get it at the A. & P. store around the corner, which did not have it then. I mentioned it to the man and he said they had the Niagara Falls biscuit, like Plaintiff's Exhibit 1. He said that was similar to it. I went across the street and bought it at the neighborhood store. where I continued to buy it for almost two years. Then the clerk in the A. & P. called my attention to the fact that they had it. I have gotten them there since. I use and like it. The child seems to like it. Personally, I like the brown covering, the appetizing appearance and the different or nut-like flavor. I do not tire of it so easily. The size is smaller.

CROSS-EXAMINATION.

The Witness: It is smaller than the other biscuit, shredded wheat, which I have used. I have only done buying since I was married. Until then, we did not use so much of it at home. I very seldom purchase it now. Before we had the Kellogg biscuit, I had used and known of shredded wheat. It was not a new product to me. I had been using shredded wheat for the little girl, right along. I was trying to find a food that would agree with her and that she would like to eat. I had tried her with shredded wheat.

I am a friend of Mr. Lewis, of the Kellogg Company. I have known him about a year and a half. I am here at his request to testify about this Kellogg product.

WILLIAM J. GRAY.

Deposition taken at Syracuse, New York, March 20, 1933.

DIRECT EXAMINATION.

The Witness: I am manager of the Onondaga Cafeteria in the hotel here, in Syracuse. I have been with them twenty-one years. We handle Niagara shredded wheat, also Kellogg's Whole Wheat Biscuit. Those products are served in the packages. They pick them up. We put them in bowls on the counter. When a guest takes one to the table, the girl takes it off the tray and opens the package. The guests pick up the packages, and they take the biscuit out.

Both packages are on the counter, not necessarily alongside each other. There may be other cereals between. We have always sold the Niagara shredded wheat in this long individual carton, except for a very short period. I did not think there were any short ones in the house, but one got on the counter, somehow, today. Our chef ordered shredded wheat biscuit.

The dealer had trouble getting the long biscuit and said we would have to use the little ones he sent until the others arrived. Defendant's Exhibit 75 is the package that was brought up from my cafeteria. Defendant's Exhibit 76 is an individual package of Kellogg's biscuit, also brought from my cafeteria, I believe.

The short biscuit we got were in a carton like Defendant's Exhibit 71. We found that the biscuit in the longer cartons, like Defendant's Exhibit 75 sold the better of the two in our cafeteria. I have had to change the biscuit or give more biscuit to customers who expected to get these long biscuit. That was why we went back to the longer Niagara Falls biscuit. We do not handle the short biscuit because we had too many complaints about them. I have had no complaints about the Kellogg product.

CROSS-EXAMINATION.

The Witness: The nature of the complaints about the short shredded wheat biscuit was that they thought they were not getting enough. They thought we were cutting down the portion. We have never had any complaints of that kind about Kellogg's. We have some customers who like shredded wheat biscuit and they know it. They take the shredded wheat biscuit and they will probably take Mr. Kellogg's Whole Wheat Biscuit when they are under doctor's orders to take those things. I do not suppose the doctor's orders apply only to Kellogg's Whole Wheat Biscuit.

I would not be surprised if some people would think Kellogg's biscuit is whole wheat and shredded wheat is not, notwithstanding that it says on the bottom "shredded whole wheat." People do not always read the packages. I think they are rather careless about that especially after they have known and used the product, and they take the package more or less for granted. They take it for shredded wheat, or whatever they want to.

I have operated this cafeteria thirteen years or so. Ever since we opened. I have been carrying shredded wheat. Before that, I knew it, probably and have known that biscuit all my life. I have been familiar with it in the individual and the large packages. When we first opened, we carried the large package, and put the biscuit in a dish, in the old days. We use more shredded wheat than Whole Wheat Biscuit. Since Kellogg's biscuit has been introduced in our restaurant, some people will help themselves to it.

When we had some of the smaller individual packages, some people returned the shredded wheat and made complaints, because they felt they were not getting a full portion. People never bring back the Kellogg package, to my knowledge. I assume they have gotten so used to looking for it, they take it.

RE-DIRECT EXAMINATION.

The Witness: The proportion in which the Kellogg and the National sell is about one to three, I would say, in our place. Our customers seem to like the serving in individual cartons. We serve all cold or uncooked cereals in individual cartons. I would not be surprised if it has been ten years since we served any cereal out of a large carton like Plaintiff's Exhibit 1. We made the change in cartons for cereals because I think it is cleaner, and our customers seem to think it is cleaner. The individual cartons of Kellogg's and the National are just as easy to buy. We are serviced through a wholesaler. We have a purchasing agent or specialty man who buys through the wholesaler.

JOSEPH T. LEWIS.

Deposition taken at Syracuse, New York, March 30, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am in charge of Kellogg sales in New York State outside Manhattan. My territory runs down to Poughkeepsie, from there north and taking in all the rest of New York State, no territory outside the State. The Shredded Wheat plant at Niagara Falls is in my territory. I have been with the Kellogg Company fourteen years and in my present position about eleven.

We handle the full Kellogg line: Corn Flakes, Pep, Rice Krispies, All-Bran, Krumbles, Kaffee Hag coffee, and Whole Wheat Biscuit, also the individual cartons comprising those. We service the jobbing, retail, and restaurant and hotel trade, and institutions, everything.

concerned, we told him our side of the controversy, and there was no National Biscuit Company man present to explain their side of it. We did not invite him in; we invited him out.

RE-DIRECT EXAMINATION.

The Wirkess: At any rate, they came around to our side of the controversy and promised they would behave themselves. They had no idea that we, as grocery men, could throw it out as successfully as we did. They did not say we could not in so many words, but the agent told us we had to have those goods, that we knew our customers wanted them, and we had better not do that. But we told them. We did do it by cooperation. We all got together and pushed the National off the map. We put that thing over. If we had a little more of that co-operation, we would be better off. If the grocery men got together today, they could lick any manufacturer showing favoritism, I think, and I think they ought to; but it is hard to get a lot of men together and co-operating.

RE-CROSS-EXAMINATION.

THE WITNESS: I do not think a retail grocer ought to be like a slot machine, just handing out anything a coin is pushed at him for. Then he is not a groceryman. I do not think there is anything improper in explaining their side. I think we had the right of it. I have a store, do a very nice business, handle a nice class of goods, better class than most grocers buy. I buy a good bit of stuff from Sprague-Warner, Chicago, and feature those goods, being the only man in my territory having them. If I can get my customers to say they want those goods, they have to come to me. They cannot run to the chain stores or the other fellow. Sprague-Warner establishes an agency in each town. We have an exclusive agency.

RE-DIRECT EXAMINATION.

THE WITNESS: The other grocers could put in a competitive line of goods; but they cannot buy Sprague-Warner's peas or corn. They have their own label and their own line. Sprague-Warner have competitors to whom they can go to get competitive lines of products. If I could not get Sprague-Warner goods, I would certainly know where to go to get-a line in com-

petition with that.

We had some display work on Kellogg's Whole Wheat Biscuit, window displays. We got up a fair store display, also. That was when the other biscuit was in the back room, not that we had any feeling against the goods." It was a matter of feeling between the National and ourselves. When the old Shredded Wheat Company had it, there was no feeling there and no disputes over discounts as between customers. When it went into the hands of the National Biscuit Company, we felt they had discriminated against us and we had the right to fight back.

We do advertising, featuring certain lines and prices at different times. We have postal cards we send out every week to probably two or three hundred people, customers or prospective customers, with line specials. We do not get co-operation from the National Biscuit Company by samples, etc. Some grocers I know get an allowance for advertising, but I like to be my own boss. I pay for my own postal cards and do my own advertising. I have not looked for any allowance. I think there should be a price on the goods and all these allowances ought to be stopped. Then we would build up better business conditions, get away from all this petty larceny, by which one man gets seven per cent., another four, and another loses out. The quicker the manufacturer wakes up and does a legitimate business, the sooner we will all be better off. I do not understand that the Kellogg Company gives any advertising allowances. I never heard of it.

Whole Wheat Biscuit is a Kellogg item. We are instructed to sell the complete line and endeavor to get a full distribution in all retail stores. We are supposed to get full representation of every Kellogg item. Different products require different methods. On Whole Wheat Biscuit we have done sampling, newspaper work, store demonstrations, Saturday sales, and house-to-house selling campaigns, where we would sell an interested party a package at the door a package and give them a package. We went to considerable expense introducing it that way. It was rather expensive

sampling.

We get dealer co-operation and advertising, but we do not pay anything for it, no advertising allowance whatsoever. The dealers pay that in mentioning Whole Wheat Biscuit. We get window and store displays. All those methods have been very successful in introducing Whole Wheat Biscuit to the consuming public. I think we have built up a substantial business in Whole Wheat Biscuit in our territory. That business is on the increase, still growing. I will say we have better than ninety per cent, distribution of it in the wholesale trade and about sixty per cent, in the retail trade in my territory; and better than seventy-five per cent. in the restaurant and botel trade, which is serviced . mostly in the individual cartons. About seventy-five per cent, of the restaurant trade is done in individual packages. Some restaurants still use the large packages; confined to cheap sections where there is no consumer preference, cheap restaurants, the railroad district, markets, and so on.

They may buy from wholesale grocers, if they wish, or from our salesman, if he happens to call. The cellophane-front type of package of Whole Wheat Biscuit, like Plaintiff's Exhibit 161, has been very helpful in building up business. I have had more than one-

quarter the volume of the biscuit business in those packages. When I sell a case, it will not be all cellophane fronts, just one or two packages, at the most, to a case. Those cellophane fronts cost me, as district sales manager, more than the other packages. It is charged to my sales promotion expense. I have to pay that myself, on the selling end of it. Because of that, we try to limit the cellophane fronts; but we are willing to spend money on them if they will produce business.

There are quite a few self-service stores in my district. They remain about the same, not growing, except in some markets, some of the chains have revamped their stores and put in self-service. Some have both types of service. A grocer said this morning that some department of his store was fixed so people could.

wait on themselves, but not for cereals.

I do not think there is, physically speaking, any confusion between Niagara shredded wheat and Kellogg Whole Wheat in this territory. In our organization, we emphasize the fact the Kellogg biscuit is to be known as Whole Wheat Biscuit and we do not want the word shredded used at all. I think it is a selling advantage to have it known as Whole Wheat Biscuit? We want to build the product and we have succeeded in doing so, making it known as Whole Wheat Biscuit.

We have window displays, posterettes, cutouts, cards, and everything that goes with our regular display material. They are similar to the selling methods we use on other Kellogg products. We use the Jumbo package display, with two biscuits reproduced, as on their package. Dealers co-operate with us very freely. We get window and ledge displays, have it featured in their handbills, etc. Generally, our biscuit sells for a cent or two higher than Niagara Shredded Wheat. They sell for ten, sometimes nine. Our seldom sells less than ten, eleven, and twelve; sometimes, two for a quarter.

The Ke'logg Company want us to sell the individuals in all restaurants. We are struggling for a hundred per cent. restaurant distribution on all cereals in individual cartons. There is an advantage to the Kellogg Company in having their goods reach the final consumer in a carton. It is more sanitary and a nicer appearance. You can assure the contents of the package being delivered to them in better condition.

Whole Wheat Biscuit and shredded wheat encounter competition of other cereal products. Muffetts have been very active during the past few weeks. They were active about two years ago and just recently they have revamped their package. Samples have been sent to each grocer. They are emphasizing the words Whole Wheat Biscuit in their new package. Defendant's Exhibit 77 is the older package, with the words Whole Wheat Biscuit in relatively small letters at the bottom. In the new one they brought it up and made it larger. This exhibit also shows Muffetts in a dish or saucer.

Defendant's Exhibit 78 is the newer package, just on the market within the last two or three weeks. It has Quaker, small, at the top, then Muffetts, and then the next most prominent feature is Whole Wheat Biscuit. Under that is a picture of the biscuit, and then under that: Enriched with sunshine vitamin. The Quaker Oats Company.

The old package was printed; Irradiated with ultra-violet ray. Contains sunshine vitamins. The new package says: Enriched with sunshine vitamins.

Triscuit, like Defendant's Exhibit 16, is in our territory and still used. It says: Uneeda Bakers Triscuit, one hundred per cent. whole wheat cracker pressed into cracker form. It is generally known as shredded wheat in cracker form; so shredded wheat is put out in two forms: one a biscuit, and the other a cracker.

The Kellogg Company has used newspaper advertising quite extensively in my territory. They have

had store demonstrations. Those are all regarded as effective means for creating consumer knowledge of and demand for a new product. The purpose of it is to create consumer demand for the product. Those are all general, means used for creating consumer demand for all our line of products.

Comparing the Kellogg biscuit carton with the National shredded wheat carton, the interior of the package is fitted with a different kind-of separator, a cushioned insert between each layer of biscuits, which I understand is put there to prevent breakage. The liner of our package is a patent coated stock, a green paper lining. The Niagara product is gray box board with no liner in the carton and no cushioned partition between the biscuit, although there is a partition.

In pushing the Kellogg biscuit in our territory, we emphasize the size of the biscuit, smaller and fits the bowl without having to break it. We have had comments it is just the proper size. Two is the proper serving of this biscuit and two of the other is too much. It is toasted on top and bottom, has a finer shred, eats better. The toasting on top and bottom brings out the flavor. It is a darker biscuit and three more biscuits in the package, a half an ounce more in weight. These methods of advertising and creating consumer demand have been very effective in building up a substantial business in my territory for Kellogg's Whole Wheat Biscuit. Another point is that the wholesale carton. containing twenty-four packages rather than thirty-six, gives a better turn-over. They like it better because they can keep them fresher. Those are handled through the regular Kellogg salesmen who handle the other Kellogg products. They are instructed to check the full Kellogg line and see if they are moving. -It is up to them, whether they are on the floor, the counter, or where, to keep them moving. Packages are exchanged if they have been there too long.

We have a substantial institution trade in this territory. Kellogg's Whole Wheat Biscuit are used in Dannemora State Prison, Comstock Prison, Sonyea Rochester State Hospital, Syracuse University, Manlius School, and Auburn Prison. In prisons, it appeals very much to them because of the size of the biscuit. We receive invitations to bid on Whole Wheat Biscuit. Some of the specifications call for shredded wheat and some for Whole Wheat Biscuit. When the invitations to bid call for shredded wheat, we write the full name out as Kellogg's Whole Wheat Biscuit, fifteen biscuits per package, twelve and a half ounces to the package, and twenty-four packages to the case. We change the specifications, so it is clearly understood when they receive it what we are bidding on. When it goes back to the person sending it, it specifies Kellogg's Whole Wheat Biscuit fifteen biscuit to a carton and then quotes the price. Pretty nearly all our bids have been accepted that way. I have one here in my pocket. The general policy in this district is to amend those bids to specify the Kellogg product, so it is clearly understood. That is the real purpose of it. When this bid, Defendant's Exhibit 79, came to us originally, it called for eighty pounds corn flakes and ten dozen shredded wheat. It came in the mail, not by direct solicitation on our part at all. We added, after the words shredded wheat, Kellogg's Whole Wheat Biscuit, twenty-four twelve-and-a-half-ounce packages to the case, filteen biscuit to the package. We filled in the name Kellogg after that line, on both items and returned it to the Woman's Relief Corps Home at Oxford, New York. This is a copy of it, March seventeenth. Similar bids have come in that are and have been filled on our orders.

I bid on a quotation from Comstock Prison, Great Meadows Prison, recently. We always had their business. Last year we did not get it. We investigated and found Shredded Wheat had been giving them numerous samples to bring the cost down under ours, and we lost the business, a hundred-case order. We got a bid on Saturday and re-established ourselves. We never had any of these institutions return these bids to us as not covering what they wanted. We have the line drawn pretty fine on Army institutions. They say products similar to shredded wheat, or Kellogg's, either one, or may call for Corn Flakes. They establish a standard of purchase by that. I have in mind the Soldiers' Home at Bath. They ask for it that way. I bid on it and get it.

I am quite sure Defendant's Exhibit 79 came to us through the mails from the Women's Relief Corps Home. There was no solicitation on our part at all. I presume an invitation to bid went to the National Biscuit Company. I do not know. They go to all com-

panies on their list of cereals.

The Kellogg Company makes absolutely no advertising allowance to advertise their Whole Wheat Biscuit. In this territory, we have had dealer co-operation and advertising paid for by the dealer. It is customary for the dealer to accompany that with advertising displays, window and floor displays, etc. We have had the Wheel of Knowledge and have built up a nice lot of business as a result of it. It is tied to a package. For instance, in the A. & P., we put them in at the factory. It is not touched until they open it up in the store. We put a poster in to use if they so desire. Only about half of them use it. It is a very quick and appealing premium, especially with children. We have used the Jungle-Land Books and the Singing Lady books, on account of the broadcast over the WHAM radio station. Kellogg's Whole Wheat Biscuit is referred to in the radio broadcast. All our cartons carry a full list of Kellogg items, including Whole Wheat Biscuit. Each carton of a Kellogg product, Corn Flakes or anything else, carries on the side into the home the names of the rest of the Kellogg line.

We have been successful in getting Whole Wheat Biscuit into some of the chain stores. In Syracuse, we got the A. & P., American Stores, Community Stores, and Grand Union on larger markets only. Those are the principal chains in the city service. The A. & P. held me up for two years. When a consumer demand had been created, they let us in. The same thing applies to all.

CROSS-EXAMINATION.

The Witness: I suppose Kellogg's Whole Wheat Biscuit is in direct competition with shredded wheat. As far as cereal products go, shredded wheat would be the principal item with which it does compete. I would not say Kellogg's biscuit is designed to compete with shredded wheat. It is similar in appearance. It answers the same call and can be sold where shredded wheat has been specified. It is fair to say it is designed to compete with shredded wheat biscuit.

The Women's Relief Corps Home is a State institution, required by law to receive bids for their supplies, every quarter. Defendant's Exhibit 79 is one of those requests for quotations, upon which we send in our bid and at times receive the award of the contract. When it reached me, the word Kellogg did not appear on it, nor did Whole Wheat Biscuit and so forth, now appearing in the blacker typewritten type. It read only: Corn Flakes, quantity eighty, unit of measure, pounds, and shredded wheat, quantity ten, unit of measure, dozens. The invitations to bid as received by me called for ten dozen shredded wheat.

Upon receipt of it, I filled in, under the column Brand, the word Kellogg in each item. They left the column open for the brand. They just have it open the way you see it written there. No more than Corn Flakes is specified there. That is typical of our practice in dealing with State institutions when they request it.

We have army bases in our territory and receive requests for quotations from them. If I recall correctly, they ask for biscuit, shredded and toasted I have none before me. I do not think they ever ask for shredded wheat. I have no recollection of it. When I get a bid invitation of that kind, I treat it in the same manner I have treated Defendant's Exhibit 79, specifying it is Kellogg's Whole Wheat Biscuit. They clearly understand what we are bidding on when they receive it. It is typical of State institution bids. We receive quite a number of those in the course of a year and obtain quite a number of awards of contracts on bids of that kind. They do not all include biscuit. Some of them use no dry cereal but Corn Flakes. I do receive quite a number calling for shredded wheat as this does. There is always a column for us to specify the brand. When the request for quotations is received, it frequently has, under Article, in the first column, the designation shredded wheat.

The figures of distribution I gave are my estimate of the entire territory over which I have jurisdiction; 90 per cent. of the wholesalers, 60 per cent. of the retailers. That is based on my observation. I travel about my district, and I have thirteen salesmen under me. Our salesmen are very particular not to use the word shredded in connection with the promulgation of sales. We do not want the word shredded used. We are very particular to specify that it is Whole Wheat Biscuit. That is the name of the product. Our purpose in doing that is to avoid any confusion with the

well-known shredded wheat. We want to establish it as Kellogg's item, under the name Whole Wheat Biscuit, without reference to shredded, or anything of that sort.

XQ. 175. Do you think that the present package of the Kellogg Company, like Plaintiff's Exhibit No. 161, which contains on one end of it the expression "a shredded wheat product," and, on the other end, "shredded wheat in its most delicious form," helps you in that respect to establish the identity of the product?

A. Well, I cannot say. It is pretty hard to point your finger at any direct result in advertising.

XQ. 176. You do not like the use of the word "shredded"!

A. No. I say, when we are talking about the biscuit, we refer to it exclusively as Kellogg's Whole. Wheat Biscuit.

XQ. 177. Yes. You said you did not want to use the words "shredded wheat." And yet, on your company's package, the word occurs at least twice. I ask you if that does not hamper you in attempting to distinguish this as a whole wheat product, as distinguished from shredded wheat.

A. Well, I do not know whether it does or not.

XQ. 178. You had not thought of that?

A. No.

The Witness: When I said the price of shredded wheat was two cents lower, I was referring to the retail price. I could not say what the comparative price to the wholesaler would be, because every wholesaler does not handle it, in the smaller towns. I was asked the prevailing price in this market, which is two for nineteen cents on shredded wheat. I do not know that the wholesale price of Kellogg's, pound for pound, is cheaper than shredded wheat. Ours is packaged two

dozen and the other three dozen to a case. The last was three-thirty on shredded wheat, which, reduced would make it two-twenty for two. Our price is two dollars and five cents.

I do not regard Triscuit as seriously competing in the cereal line. Muffetts were very good a year ago. They seemed to die out and just recently came back with a new package, and are making an effort to re-establish it.

XQ. 190. There is no confusion in your mind between Muffetts and Whole Wheat Biscuit and shredded wheat, is there?

A. Well, some people talk of them as another shredded wheat in ribbon form. I have heard that frequently.

THE WITNESS: It is ribbon form, a sort of flat,

wound-up biscuit.

Practically all our sampling has been done with the full-sized package. Our method of doing that is not in all cases to offer to sell one and give one. We do give away full-sized packages as samples, without any sale at all. We just go from door to door. I cannot recall offhand how many packages we used that way in this territory. There are so many. When we give them, we procure the samples from our warehouse. When we sell them, we buy them from the retail grocer. When we have a campaign selling one and giving one, all we sell are purchased from the retailer in that locality. Those we give come from our own warehouse. The entire cost of that is charged to me, to promotional expense.

RE-DIRECT EXAMINATION.

THE WITNESS: Defendant's Exhibit 79 is addressed to the Kellogg Sales Company, 317 Union Building, Syracuse, New York. We are on the regular

mailing list of those institutions, governmental, private, and State. One line says: Bids cannot be accepted unless size, kind, and brand, and, if possible, manufacturer of each article is specified. They expect us to fill them in.

The first column is labeled check-mark. We do nothing with that. The second item is article. When that came to us, it had two articles, Corn Flakes and shredded wheat, specified. The next column is labeled Brand, and that was blank. I have never seen any of those lists filled in by the National Biscuit Company. I do not know whether they fill in any brand name there. I possibly could get you that information. The next column is marked substitute brand. I conclude that means "or equal." The next three columns are quantity, then unit of measure, and prices f. o. b. Oxford, N. Y., per unit of measure." That practice of our office filling in the brand name after the article named has prevailed about five years, that I know of,

Grocers call goods by the, name on the front of the package. The Kellogy Company has been successful in impressing the name Whole Wheat Biscuit for this product on the trade. Practically every packaged product in the trade has some dominant name on the package. The Kellogy biscuit is known in the trade by the name Kellogy's Whole Wheat Biscuit.

If somebody who had never seen this Kellogg product asked me what kind of product Kellogg's Whole Wheat Biscuit is, I would say it was a shredded whole wheat. I do not know what else I would call it as a purely descriptive name. I never have heard of any other name. As far as Defendant's Exhibit 79 is concerned, there is no question whatever that, when it came to me, the two names Corn Flakes and shredded wheat were all that were listed under the column entitled article, and the brand names in there were left blank and I filled them in.

RE-CROSS-EXAMINATION.

THE WITNESS: I called it shredded whole wheat right away, because it is descriptive. If you take wheat, shred it, and make biscuit out of it, it is shredded whole wheat, in my mind, just as if you take corn and flake it, which is corn flakes. It has the appearance of going through rolls. It is shredded. In this particular case, it has the appearance of being fine shreds, about the same size as string. I am not a farmer, I do not know what a corn shredder is. When corn is shredded. I know it is torn into little bits. I know shredded wheat is not torn into bits. It is pressed out into a long string, and so is Kellogg's biscuit. It is natural for me or any one of the public who has known the product so long to call a product similar in appearance shredded wheat, because that is the only name that has been applied to it since it has been on the market.

I know that, years ago, a man named Perky got out this shredded wheat biscuit. Prior to that, at least before my connection with the cereal business began, I knew there had not been any article of food like it. Before my connection with the cereal business, I knew of this shredded wheat biscuit. I did not know anything else like it or any other name to call it by, not that particular product. That is the name it has always been called by. I do not know how your product is made; but I know it is a very similar product, made in a similar manner.

RE-DIRECT EXAMINATION.

THE WITNESS: I have heard of shredded soap, shredded coconut, and shredded codfish. I am familiar with them in a general way. Gordon's make a shredded codfish. As I know it, codfish comes in a big solid cake, or that is the way I usually get it. It is cut up

into fine assorted shreds. Shredded coconut is the same thing. It has the appearance of being rolled, but I do not know whether it is or not.

RE-CROSS EXAMINATION.

THE WITNESS: Shredded codfish is not put throughrolls and pressed out into a long string. But we have
Wheat Krumbles. That is shredded. I never saw a
package from Canada of Wheat Krumbles, called
shredded wheat. Wheat Krumbles is a shredded
product.

HAROLD W. BUSH.

Deposition taken at Syracuse, New York, March 20, 1933.

DIRECT EXAMINATION.

The Witness: I am a wholesale grocer, a general wholesale house, with a small voluntary chain, called the Three B Stores, of which there are somewhere between eighty and ninety. We have many more wholesale accounts with independent stores. I have no traveling salesmen through my territory. We operate mostly by mail and telephone, the customers mailing or telephoning orders in. We send out circulars and sometimes solicit by telephone. I think we have between five and six hundred accounts, not all steady.

We handle Kellogg's Whole Wheat Biscuit, also the Niagara Falls shredded wheat biscuit. We sell a great many more of the Whole Wheat Biscuit. When we get an order for shredded wheat, we ask them to identify it, whether they want Niagara Falls shredded wheat or whether they want Kellogg's Whole Wheat Biscuit. We identify that as Niagara Falls shredded wheat in our office. We do not now have any confusion

between those two products. I never knew it to happen that they had to send one or the other back and say they wanted the other product. There is a substantial continuing demand for Kellogg's Whole Wheat Biscuit from our trade. I should say that demand comes pretty generally from the whole trade. We have not created that demand. It has come up in some other way; but I know it is an existing demand.

CROSS-EXAMINATION.

THE WITNESS: I do not know whether there might have been some confusion at some time or other. I know there is not now. I do not recall ever having had any. I take no orders, except on rare ocsasions. I am just one of the owners of the business and manager of it. I have been in the business since 1920.

XQ. 29. So that you recognize at the present time that, if or when you received an order for shredded wheat, there might be some confusion if you did not ask what was wanted?

A. Well, if they simply said shredded wheat, we would have to identify it, because there is some confusion, perhaps, in the minds of the buyers; although I do not know that.

... XQ. 30. Yes, but you would expect that there might be some confusion, so you would ask them to identify which product they wanted.

A. Our clerks do.

THE WITNESS: When I say shredded wheat, I refer to this product which has been made at Niagara Falls for so many years. I have been familiar with it for a long time, have seen the package for many years. I have not visited the factory. I worked as a clerk in the grocery business, myself. I have been in the business longer than the ten years I told you. During that time, and ever since I went into the business, I have been

familiar with shredded wheat. Before Kellogg's biscuit was on the market, if I were asked for shredded wheat, I would have no doubt the party wanted shredded wheat like Plaintiff's Exhibit 1. There was then nothing else I remember that I could fill that order with.

XQ. 42. How long would you say that it has been that you have adopted the practice of inquiring of customers in order to avoid the confusion between the two?

A. I cannot remember when, and I am not able to give you the time when. But, if I might answer this at some length: When Kellogg's Whole Wheat Biscuit became quite a factor in the cereal business, we did, I believe, at that time—although I could not personally say from my own experience—have people call in and say shredded wheat, when, sometimes, they meant Kellogg's Whole Wheat Biscuit, or vice versa, perhaps. I presume that has occurred, not from my own experience, but I know it from hearing about it from clerks in the office.

THE WITNESS: I have no knowledge how long that has been the fact. It has been comparatively recently, within a few years. It was comparatively recently, I would say a few years, that it would arise when people would ask for shredded wheat and expected to get the Kellogg product. Prior to then, when the National began to distribute shredded wheat or handle it, we purchased it direct from the Shredded Wheat Company, and we, I presume, handled it in large volume at that time in comparison to the size of our business. It was always a good seller and in good demand up to the time they took it over.

I know the National distribute shredded wheat direct to the retailer, but I do not know why I sell more of Kellogg's. It seems to me the fact they do distribute it direct would be a fairly satisfactory explanation. I

do not knew that there would be any confusion between the two products, because I do not use it in my own home. It is years since I saw a package of either biscuit opened. I am not readily familiar with the appearance of either. I saw shredded wheat, of course, years ago, but I do not use either one at my home and never sampled it.

RE-DIRECT EXAMINATION.

The Witness: Up until National took over the Niagara Shredded Wheat business, the wholesalers distributed quite a good deal of shredded wheat. I know that was our experience. That has been for a number of years. I should say that business was cut off over night by the direct distribution. Our sales dropped off immediately or very soon thereafter, a very substantial drop-off. There was a time when I did not handle shredded wheat at all. I only handle a small quantity of it/now, for the benefit of our out-of-town trade that may not have been serviced by their rigs, and may want some or have call for it.

ROBERT H. MOSES.

Deposition taken at Syracuse, New York, March 20, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am secretary of Bentley Settle & Co., Inc., wholesale grocery, old-line. We have approximately fourteen traveling salesmen, covering a territory about a hundred and fifty miles north, thirty miles south and east, and about fifty miles west, of Syracuse, taking the biggest towns: We have approximately nine hundred active grocery accounts, about fifteen hundred book accounts.

We handle Kellogg's Whole Wheat Biscuit and service it through our active customers. There is a general continuing demand among our retailers for that product. We handle, also, the Niagara shredded wheat, like Plaintiff's Exhibit 1. I do not know it as Niagara shredded wheat. I have never had it referred to as that. All we ever called it was shredded wheat. I think our sale of Kellogg's is more now than of shredded wheat. Shredded wheat is now serviced by the National Biscuit Company direct.

Our order men take most of the orders. There are a few telephone calls. Orders come in for a product like Plaintiff's Exhibit 1 as Shredded Wheat. Orders come in for the other just as it is written here, Kellogg's Whole Wheat Biscuit. There cannot be any confusion. I do not handle the receiving end and would not know if any were returned to us with the statement

they wanted the other product.

We have a service of between five hundred and fifty and six hundred stores, over which we have no control, financial or otherwise. It is merely the basis of an advertising idea. It has the result of bringing them in under certain benefits and certain discounts. I have done nothing myself to create a demand for the Kellogg biscuit. The demand comes to me already-created, from the retail trade.

My fourteen traveling men carry Kellogg's biscuit in the catalogue. We are supposed to try to sell everything we have listed. We do not push this any more than any other item. They are supposed to get orders for any item we carry. Whole Wheat Biscuit is one of those items. Our men travel and cover their territory very effectively.

When the National took over shredded wheat, I do not know whether they cut out wholesalers and jobbers for a while. We carried along with them. We still do sell shredded wheat and list it. The present volume on

Kellogg's biscuit is not quite as large as the volume we used to have on Niagara shredded wheat; but it is a substantial volume.

CROSS-EXAMINATION.

THE WITNESS: In our catalogue, we list shredded wheat, thirty-sixes, also shredded wheat, individuals. We carry both kinds. We carry also the Kellogg individuals, I think. I know we carry the regular whole wheat, because I am clear on that. Most of the individuals are sold to hotels and restaurants by their men, I believe.

I have carried shredded wheat under the name for a long time. I have been actively connected with the business eight years. The grocery business with me has been more or less of a family arrangement. I have been in it all'my life. The ownership is in my family, in that line.

The way it is listed in the catalogue, there can be no confusion between the two with our men. There are two products carried in our catalogue, and there is a distinction between them. When our men take orders, they should list it in the way it is carried in the catalogue. We have a few telephone calls from customers. When they ask for shredded wheat, we know what they want right away, and that is what they are shipped. They get that product, like Plaintiff's Exhibit 1. That has been so for many years, I imagine a great many more years than Kellogg's biscuit has been on the market. All I know is since the time when I became acquainted with this one. I became acquainted with Kellogg's Whole Wheat Biscuit comparatively recently. Shredded wheat is an old product. It has been carried under that name continuously for many years.

RE-DIRECT EXAMINATION.

THE WITNESS: My organization services also the restaurant trade. I am sure that trade is serviced prin-

cipally by us in individual cartons, as far as the regular shredded wheat is concerned. It is very, very small. In fact, I think there is only one account I know of, on individual shredded wheat, and that is all.

As far as the Kellogg Company is concerned, they have an institution man who covers that trade thoroughly.

RUSSELL BORDERS.

Deposition taken at Cincinnati, Ohio, March 21, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am sales manager and assistant buyer of Otter & Company, wholesale grocers, Louisville, Kentucky. We are one of the old-line service jobbers, having six salesmen at the present time. We service all of Louisville and one man in the State covering a radius of forty-five miles from town. The center of our territory is Louisville proper. At present, we carry about eleven hundred accounts. In normal times it is about twelve to thirteen hundred.

We handle Kellogg's Whole Wheat Biscuit, and have handled it about two years, ever since they came out with it. When they first came in, I did not know exactly what the product was. I found out later on it is a small wheat biscuit, toasted on both sides, not a solid biscuit.

We have handled a biscuit of that general type and appearance, the original shredded wheat biscuit. It has been a year and a half since we had any. We handled those until the National Biscuit Company bought them over. Then we decided to discontinue shredded wheat. The National Biscuit Company was never known to deal fairly with the jobbers. We bought just one lot after the National took over. They made us

buy a hundred dollars' worth at a time, and we put Uneeda Biscuit with it to complete the amount so we could get a discount really worth working for. We had to buy a hundred dozen Uneeda Biscuit to make the required amount. Before they were all sold, the Uneeda Biscuit went bad, and they changed them for us. I know no jobber in Louisville handling the National Biscuit Shredded Wheat. I do not know about others. I do not know of any exactly.

I think I have carried Kellogg's Biscuit about two years. There is now a nice demand for it. The biggest portion of mystown accounts buy it from me regularly. The country merchants do not carry that class of merchandise very much. They do not carry shredded wheat or but very few cereals of any kind. All my retail castomers who carry whole wheat biscuit of that kind carry the Kellogg product. The demand for it has been increasing in the last two years. We have carried more than we usually do. Customers generally ask for Kellogg's Whole Wheat Biscuit. The Kellogg specialty men have helped to create that demand. When they put a new product on the market, it is customary for jobbers to ask a guaranteed sale, because it is hard to take a new product and carry it over. They used to come in, pay for it, give us a nice margin of profit, and take it out. That is how they created a demand for it. Kellogg's guaranteed sale on it when it was first put in. They picked them up and resold them to the retailer.

We have one man who calls on nothing but hotels and restaurants, and one man calling only on institution. As a representative of my house, he sells Kellogg's Whole Wheat Biscuit to the restaurant trade, the biggest majority of which, in our territory, handling them in the smaller individual cartons. We have only one customer I can recall right now carrying all his cereals in the large package. He is an old time. He

is the only one carrying Whole Wheat Biscuit in the large cartons. I put in Kellogg's Whole Wheat Biscuit, I think, before we discontinued carrying Niagara shredded wheat. If Kellogg's biscuit had not been on the market at all when this situation arose with the National about shredded wheat, we would not have had any wheat biscuit at all, because the National Biscuit Company never would have played ball with the jobbers.

CROSS-EXAMINATION.

THE WITHES: I feel strongly about the National Biscuit Company. That represents the feeling in Louisville. The National distributes direct to retailers. It has always been their policy on crackers and cookies, as has been understood for a great many years. When the National took over shredded wheat and put it with their other distribution, that cut out the jobbers. I could not say if the National is now offering jobbers a price on its shredded wheat. I have not been in contact with their representatives recently. Before all this, my house stocked shredded wheat, of the old Niagara Falls concern. We carried it a great many years. I have been with Otter & Company since September 13, 1913, twenty years this coming September, when they started. I had previous experience in the retailing end. I knew shredded wheat twenty years ago. I do not think it was a new product, even then. I do not remember any other wheat biscuit at that time. As I told Mr. Clarke, if it had not been for 'Kellogg's biscuit, I would not today have any Whole Wheat Biscuit. Quaker Oats came out with Muffets, which were, I think, solid. We carried them once but not now. They resembled shredded wheat in a way. They are a round biscuit. They never did do much. It was, I think, a sort of ribbon of wheat, bound up in round, cake-like form. We never did much with Muffets.

Shredded wheat was never a very big seller but a steady seller. There was a demand for it. When we cut out shredded wheat we had nothing. They called for Kellogg's Whole Wheat Biscuit by name. They did not ask for shredded wheat. When they call for Kellogg's shredded wheat, we do not give them Kellogg's biscuit. We tell them we do not have shredded wheat, but we have Kellogg's Whole Wheat Biscuit. That bappens very few times. It is in contact on the telephone mostly.

When we decided not to continue carrying shredded wheat, we had some contact with a demand, some basis for it. We did nothing to help create a demand for Kellogg's Whole Wheat Biscuit, just let Kellogg create their own demand. I should think the present demand is a little greater than that for shredded wheat before we stopped carrying it. They have succeeded in creating a better demand among our clientele for Whole Wheat Biscuit than there was for shredded wheat, because I recall no time when shredded wheat had a specialty man on the trade. Kellogg has a specialty man on all their products. We carry their whole line. We have one man who does nothing else except service public and private institutions, like the Masonic Home, Home for Incurables, City Hospital, and such. We do not service State Hospitals because that is all bidding. They give you state warrants and we do not want them. We do not attempt to go into competitive bidding on state institutions. We do no local institutions, on specifications, receiving invitations to bid and submitting prices on bids. Most of them do that. I cannot recall any bid specifying shredded wheat. We get none calling for Whole Wheat Biscuit on institutions, so this particular item does not enter into it at all. I get all bids for cereals. I got a bid yesterday from Fort Knox, below

the river, which did not mention shredded wheat or Whole Wheat Biscuit. It is possible for us to make certain direct sales without bidding to army posts, on some items.

RE-DIRECT EXAMINATION.

THE WITNESS: At the time we discontinued National shredded wheat, we had not carried the National cracker line. I never did carry them. We had been carrying Niagara shredded wheat. When the National took it over, we dropped it, except we had one order afterwards. We had to take Uneeda to make up the amount, but we never did handle it before. We got a hundred dozen Uneeda Biscuit and they had to change about twenty of them.

I could not say whether we have handled Whole Wheat Biscuit in cellophane-front packages like Plaintiff's Exhibit 161. I just see the cases. We very seldom break a package. If we have to, we just cut the case in half and I see only the tops of packages.

We dropped Quaker Muffets because there was no demand. The name Kellogg's in our house we consider an advantage, because they are very square in their dealings.

CLARENCE PAUL PETERSON.

Deposition taken at Cincinnati Ohio, March 21,

DIRECT EXAMINATION.

THE WITNESS: I am forty and district manager for Kellogg's, having been in this territory about thirteen months. Previously, I was in Indianapolis a year. Before that I was in Europe three years. Previous to that I was in Minneapolis eight or nine years. I have been connected with the Kellogg Company fifteen years in June. My present district covers two-thirds

of Indiana, Peru, Kokomo, and everything south. We do not have the extreme border of Indiana, Vincennes, Terre Haute and Evansville. We have the whole state except the extreme west and extreme northern portion. We have all Kentucky, except fourteen counties in the extreme western part, and sixteen counties in Ohio, the two Virginias, western end, including Charleston, Bluefield and Buckeye. We really work in parts of five states out of Cincinnati.

I would say, roughly, approximately, there are perhaps between eight and ten thousand retail grocery stores in our territory. We carry and push the sale of the entire Kellogg line Corn Flakes, Rice Krispies, Pep, Bran Flakes, All-Bran, Whole Wheat Flakes, Kaffee Hag, Krumbles. In Virginia we are selling a product known as Wheat Krispies.

About 65 or 75 per cent. of the wholesalers and around 40 or 50 per cent. of the retailers in our territory stock Kellogg's Whole Wheat Biscuit. Our distribution in the restaurant trade is approximately 65 to 75 per cent. There is apparently a consumer demand for it in our district. Our sales seem to increase.

To create that demand, we have put on promotion sales in stores on Saturdays. Practically every Saturday our men go into some grocery store and conduct a sale. We open up our packages, show our products, and sell direct to the consumer, which we find the most profitable way our men can spend a Saturday, conducting hundreds and hundreds of sales. In a town of twelve or fifteen stores we may conduct sales in eight or ten. We have special premiums and samples. We have had little books for the children: The Jungle Land Picture Books. We now have the Wheel of Knowledge, showing the states and their capitals. We have done some sampling, house-to-house work, introducing our biscuit, using the cellophane package, taking orders from the housewife to be sold

and delivered through the grocer, who gets the profit on them. We have worked house-to-house biscuit campaigns, selling the groces a quantity of biscuit, going from house to house, selling the housewife one package and giving one free, which free package we buy from the grocer, paying him his profit. We call that sampling work. These campaigns have been conducted in various towns, not generally. We have mailed samples to selected lists of customers in various towns, secured from the grocer who gives us lists of his customers. With respect to all of this, I am speaking now of Kellogg's Whole Wheat Biscuit. We have sent out postal cards, telling the consumer to bring the postal card into the store and receive a free package with the purchase of one. They are also advertised to consumers by listing on the sides of cartons of other Kellogg products, so a customer buying a package of Kellogg's Toasted Corn Flakes would see a reference to Whole Wheat Biscuit on the side.

We call these Saturday sales demonstrations. On biscuits, particularly, we open the package, because we want people to see the biscuit, the size of it. A good many people are not familiar with our biscuit. Many of them tell me and our men have reported many people are not familiar with it. They think of it as a flat compressed biscuit or some kind of light biscuit, not as whole wheat biscuit. In opening a package, placing a bowl full on a demonstration table, we can immediately show the consumer what our product is like. Our principal selling points are the size of the biscuit, the double tousting, the fine shreds. It is a shredded biscuit. We show them the difference in size. Many mothers tell us it is more economical to serve. Children will sometimes not eat a big bowl of cereal, but they will eat a small bowl of biscuit and consume all the cream. Our double toasting seems to appeal to the housewife. I would say that, generally

speaking, Kellogg's biscuit is darker, a heavier toasted biscuit than the shredded wheat.

We have about 50 per cent. distribution among the chain organizations in our district. Krogers, at Cincinnati, stock biscuit. That is a well-known chain with four thousand eight hundred stores. We also have Schneider's chain, with eighty-seven stores, and Burke's stock the Kellogg biscuit also.

The sales promotion plans I have described as applied to Kellogg's Whole Wheat Biscuit are much the same as the sales efforts we put behind other Kellogg products. We go to a store every Saturday and conduct sales. The biscuit being one of our newer items, we perhaps feature them at our sales. We are doing the same with Wheat Krispies now down in the Virginias.

We have window and store displays. Before we conduct a display, we have an understanding with the grocer that we must have his co-operation. It is naturally very expensive. We place a man in a store on a Saturday to sell our merchandise. We would not accomplish much without the dealer's co-operation. He permits us to put up a display in his store, usually a window display, and instructs his clerks to co-operate with us.

We furnish the trade with sales helps, such as cards, placards and store displays for Kellogg's Whole Wheat Biscuit. We have a little counter piece that a package of biscuit fits into. That comes packed in the cases. We use it right in our warehouses in displaying biscuit. We have a coupon card we mail out. We have the cellophane-front packages that we have used to pass on to the jobbers for their salesmen. They cost us more than the ordinary fronts of the Whole Wheat Biscuit. That is a charge against the local sales cost here.

The company does not give any advertising allowance to dealers to advertise their product. The dealers do advertise our products. We work very hard to develop their co-operation. We naturally get it, they knowing that featuring our product means more sales. In 1932 we secured more dealer co-operation than in 1931.

We service the restaurant trade with individualsize cartons. We push very aggressively in this district the sale of individual packages of Whole Wheat Biscuit to the restaurant trade.

CBOSS-EXAMINATION.

THE WITNESS: We do find, however, that some of the class C restaurants will buy the large package. They think they cannot afford the individual package. We have tried to prove to them that it is more economical. There is naturally a waste in serving from the large package. We will sell it to them, of course; but we do not encourage it.

In stressing all the selling points, fine shred, small biscuit, double toasting, and more economical, we are comparing our biscuit to shredded wheat. It is a shredded wheat. It is wheat shredded. I would not say it competes with shredded wheat biscnit. It may compete; but we have created a demand for our own biscuit, through our own efforts and our advertising. I would not agree with you that in creating that demand at least some of the demand for our biscuit is at the expense of shredded wheat; because I have had any number of customers tell me their shredded wheat business has increased, despite our having a biscuit on the market. I would not, however, go on record as saying that all the customers in this territory who buy Kellogg's biscuit have never used shredded wheat before. It is natural to assume that we have converted

some over from shredded wheat to Kellogg's Whole Wheat Biscuit. Insofar as we have done that, we have been competing with shredded wheat.

RE-DIRECT EXAMINATION.

THE WITNESS: We solicit business in State and county institutions and hospitals. Kellogg's biscuit have not been introduced generally to these institutions in our territory. State institutions, such as prisons, insane asylums, and so forth, do not use biscuit usually. We may sell a case or two for the officers' table, but not very many. In all our territory, I do not believe we sell biscuit to six state institutions. I do not know whether the National is more successful in selling them shredded wheat. I know of no case where shredded wheat has been sold to State institutions: insane asylums, prisons, poor houses, or hospitals, where we have applied to sell Whole Wheat Biscuit.

We have not yet covered 50 per cent. of this territory in our promotion campaign on Whole Wheat Biscuit. A great deal of our territory is not shredded wheat territory or Whole Wheat Biscuit territory, or any biscuit territory. That is true in Kentucky and in the Virginias. You can go into stores and not find biscuits in any form. You will not find the assortment or selection of cereals you find in cities, either the National or our own. We have not secured sufficient distribution to merit national advertising.

The policy of my office has been a more or less selective, job of going into markets where are people who lead normal lives and are fairly prosperous. A great deal of our territory is in Kentucky and the Virginias, where people do not act or live the same as in Cincinnati. We do not select a market like that to introduce cereals. We have distribution of Kellogg's

biscuit in about 50 per cent. of the stores in the entire territory. We have made no special effort to increase it. Our effort has been to build the business we have already started. We should have a distribution of about 90 per cent. before general national advertising is put behind the product. The methods I have described have been effective in creating consumer demand in the stage of the campaign I have reached so far.

RE-CROSS-EXAMINATION.

The Witness: There is, to some extent, between shredded wheat and our biscuit some competition. They are both biscuit and, perhaps, similar. We have an item. It is biscuit and shredded. That is, my idea of the treatment to which the biscuit is subjected in manufacture is that it is shredded. I would term them both shredded wheat biscuits. There may be some places we are pioneering, introducing it to people not familiar with it, but that is not the entire field we are trying to cover. So they are competing products. I told Mr. Clarke we are seeking our markets in places where we expect to find people who would use the product and were familiar with it. They are people, I imagine, who have been more or less familiar with shredded wheat for a good many years.

When I spoke of Saturday sales, I had reference to a sale of three assorted Kellogg products and giving one package Whole Wheat Biscuit free, done for the purpose of introducing it to the attention of the consumer. We got the free package in the grocery store, paying the grocer his profit for the biscuit. That is, when we conduct a Saturday sale, the grocer has a stock of our various products, among them being a case or so of Whole Wheat Biscuit. We keep track of how many we give away and pay him for them.

We nay use Rice Krispies, Pep, or Corn Flakes, whichever product we are trying to put over. If it happened to be corn flakes, we would give a package of corn flakes with the three. We have used that method with Whole Wheat Biscuit and other methods, too. I would not say we have used that as much as others. For instance, we have done a lot of house-to-house work, selling a package and giving one. We arrange to sell the retailer about what we think we can dispose of in his neighborhood. We pick up the free packages from the grocer. The sold package we take out of stock; that is bought, too, from the retailer.

The state institutions are not large users of shredded wheat. Two or three of them sometimes buy it. We sell those accounts all on bids. Once in a while, we pick up an order for a case or two, but not biscuit. As a general proposition, state institutions are authorized to get offers and receive bids for their supplies. We sometimes receive a specification in which shredded wheat is called for. In that event, we bid on Kellogg's Whole Wheat Biscuits. We write that in on the specification that calls for shredded wheat. We do that on any rice products, too. If they want Rice Pops, we bid on Rice Krispies. State institutions do not specify Rice Pops, but other institutions do. We have three army bases. We get specifications from them for shredded wheat. We have developed that business. They specify Kellogg's Whole Wheat Biscuit. We have done it in advertising. I presume the fifteen biscuit in the package are responsible for that. When those bids come out, they specify Kellogg's Whole Wheat Biscuit. They do not specify shredded wheat any more. Once or twice they have, in the past year. When they have, we have lost the business. The National Biscuit does get some of their business. If

we get a specification with shredded wheat, we correct it, by writing in our bid, with our name, quantities, and price. We sometimes get business with those bids, provided our price is equal to or lower than shredded wheat. I believe it is usually lower than shredded wheat on those bids.

HARRY J. HELMERS.

Deposition taken at Cincinnati, Ohio, March 21, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am vice-president of Henry Helmers Grocery Company, an old-line wholesale grocer. We have three salesmen. In and about Cincinnati, we have the chain organization of Plee-Zing, from Chicago, with about a hundred and sixty wholesale stores. Retail, there are fifteen thousand. In Cincinnati only, we have fifty-six. We service those in the main. They are retail stores, having their own name on the window and under the name: Authorized Plee-Zing Distributors. They are located throughout the city.

We handle the product Kellogg's Whole Wheat Biscuit in our wholesale and retail ends and have handled them since their first appearance in Cincinnati, approximately a year ago. We also handle National Biscuit Shredded Wheat. We have no confusion at all in our organization, as between those two products. The orders for the Kellogg product are usually marked: Kellogg's biscuit. Our salesmen mark them that way. Kellogg's Whole Wheat Biscuit is the name. They mark them on their order blanks. They order the other as just Shredded Wheat, and then we know

what to give them.

We have around five hundred accounts on the books of our wholesale organization that we sell to. All of them handle Kellogg's biscuit. There is, to a certain extent, a retailer demand in our organization for Kellogg's Whole Wheat Biscuit. I should say that demand was increasing over last year. We service very little to the restaurant trade. I would not be able to throw light on individuals, at all, because we have no restaurants or hotels. We give sales co-operation as wholesalers and push the Kellogg biscuit. We have had our salesmen carry samples to the retailer trade, a regular package, with a cellophane front. They offered it to the trade to sell.

When National bought out Shredded Wheat Company, they started out to sell the product direct. Their bread wagons would sell it direct to the retail grocer, leaving the wholesaler what business was left, which did not amount to much. Later on, it seemed as if they went back to the wholesale grocer. The wholesale grocers did not like the National Biscuit Company selling shredded wheat from the bread wagon, and I understand some discontinued it as much as possible. I do not believe National is selling any shredded wheat direct to the retail trade any more in this district. I believe all sales are going through the wholesale grocer at present.

We have not done much pushing of Kellogg's Biscuit lately at all. There is a continuing demand for it. We do not handle any crackers at all. We had to buy a certain quantity of shredded wheat per month to be allowed a certain discount. They had a sliding scale. For instance, you had to buy a hundred dollars worth per month, and you got about 10 per cent. Buying less, you got 5 per cent. Buying two hundred and fifty dollars worth, you might get only twelve and a half. That is not so now. We get our jobber's discount right off

the invoice.

The National shredded wheat was an item pretty well cut around in the trade. It is really today, yet. It affects unfavorably the profits I have made on it. It might boost the sale of National shredded wheat a little bit; but it hurts the product. It affects it in the trade when the manufacturer gives a special price.

CROSS-EXAMINATION.

The Wryses: I did not mean to say that the National Biscuit Company cut the price on shredded wheat. I never mentioned that, because I do not know. I did not mean that the manufacturer cuts the price to the trade. We are always a little bit in doubt whether the manufacturer does not give the chain store a little allowance beyond the price he quotes in the newspapers. That is what I had in mind in answering Mr. Clarke. There is a feeling in my line that National makes some sort of special allowance to the chain stores to enable them to use skiredded wheat as a loss leader. I do not know that, but we feel that that may be. The price catting I know about is the cutting of the retailer prices advertised by the chain stores.

I do not know exactly whether the Plee-Zing Stores still sell thredded wheat at similar prices to match the chain store prices, by everybody cutting down a little bit of their margin. The chain stores offer shredded wheat at ten cents a box. The cost to the retail grocer is a dollar twenty a dozen, which we must charge for them to realize a profit. We feel, therefore, because the chain store offers them at ten cents, they are getting something we are not. We have no proof of it. We know that chain stores will sometimes use a well-known national item like shredded wheat as a loss leader, on certain items. Some retailers will advertise sugar at cost; others some nationally-known coffee or other staple at a price

which must indicate a loss leader. That is bait to get a customer into the store and sell a line of goods. That device has been used by chain stores for a great many years. Being wholesale grocers, we are always a little bit doubtful about the advertising allowance, because we have already found out from five or six concerns who admitted they do it. There is nothing would make us believe Kellogg and shredded wheat do not do it. I have never had any admission or proof that the National Biscuit Company do such things. That is from the prices we see advertised by these chains.

Our idea in any of these chains, like Plee-Zing, is to give the independent retailer some of the advantages heretofore enjoyed by the purchasing power of the chains. That is the purpose of it, and of the I. G. A., owned by Mr. Grimes, and other concerns of that hature. Plee-Zing estimate their stores at fifty thousand through the country. They prevail mostly east of the Rocky Mountains. It was sponsored originally by some individual or concern. I believe they are about eight years old now, formerly organized in St. Louis. I think they are run somewhat like the I. G. A. They give you a territorial license. You are authorized by the proprietor of the name and the idea to use them in a certain territory, and gather about you a more or less cohesive group of independent retailers who own their own stores. They club together and buy most of their staples from you, and, in return, you give them some sort of uniformity in their stores, with the name, and give them the advantage of combined buying power, advice of merchandising and help in their advertising. In that way, I believe they are on a competitive basis with the nationally-owned chain stores.

We also have a regular jobber's line with independent grocers who are not in Plee-Zing Stores, and we sell them just as we always have for many years.

The stores embraced by the voluntary chain do not get a better price than we give to the regular trade. They stand on the same footing. They do not participate much in the combined buying power, as far as retailers are concerned. We have not worked that out really, so far; but we are trying to now. The idea will be to give them a little advantage for belonging to this, chain.

For instance, in our advertising group, we have about thirty-six advertisers in connection with the l. G. A. in Cincinnati. We go to a certain extent to take care of some of that expense ourselves and have them print bill-posters and hand-bills. Those who are out:

side, not in Plee-Zing, do not get that.

We stock shredded wheat now and always did. If shredded wheat was out forty-five years ago, we have always carried it. Our house was formerly a retail grocery, started by my father. He got bigger and felt he would like to invest his money in groceries, so he had to open up a wholesale department about twenty years ago. He was in the retail grocery business twenty-five years before that, so my family has had the business, retail and wholesale, forty-five years. I believe they have had shredded wheat at least as long as it has been on the market. I have been familiar with it all my life. I have been connected with my father's business twenty-four years.

I recognize the package of shredded wheat. I recognize the old package, Plaintiff's Exhibit 10, but I cannot recall when it carried the picture of a dish on the end. I myself do not get to see a lot of packages. We handle it in case lots, mostly. I have been familiar with the biscuit all this time, and it has sold readily to the trade. The Shredded Wheat Company were great advertisers and gave us the benefit of their national advertising.

When our customers ask for shredded wheat, we know what they want and give them what they want, because we do not classify Kellogg's Whole Wheat Biscuit as shredded wheat. I just feel like either one of them is a name. I imagine shredded wheat would be a trade name; of course, the same as Whole Wheat Biscuit. Shredded wheat has been a sort of household word so many years it is associated with this biscuit now made by the National Biscuit Company, in the minds of the public. That is the reason. When an order is taken, if you want to call it a biscuit, all right; but, if they say Shredded Wheat, that is all is said on the order. One case shredded wheat is the way the salesmen order it. It is not necessary to say National or Niagara Falls; it is just shredded wheat. I believe that has been so as long as I can remember in the business. That is why I told Mr. Clarke that, in our house, there is no confusion between the two. I could not say whether there may be confusion among members of the public. I recall the Kellogg package you show me, which enables the observer to look through the window and see what is in the package.

Our house does not publish a catalog. Some customers call us over the telephone, quite a bit. That is when we get orders for a case of shredded wheat. I would say shredded wheat is now moving with the

greater rapidity of the two.

Jobbers do not usually carry a line of crackers. In a city like Cincinnati, we have the National Biscuit Company or Strietmann Company, from whom we can get them for a grocer; and they are daily going around to the grocer and giving him his supply. Ginger snaps and soda crackers are perishable. It does not pay to stock them in a warehouse. It has been the practice of people like bakers and the National Biscuit Company to service the retail trade direct for many, many

years. As far as I know, members of Plee-Zing Stores obtain supplies of crackers from the National or Strietmann. That we do not concern ourselves with. We make no effort to dictate to members of the voluntary chain whose line of crackers they shall carry. We are approached by representatives of various manufacturers; but we have an advertising group and a board of control who get together every Thursday and decide what they will advertise the following week. We have an advisory council of twelve grocers once a month who run the meeting. We are only there to tell them right from wrong. We do not now have any arrangement to combine in purchasing crackers and get the combination discount. That is entirely up to the individual.

RE-DIRECT EXAMINATION.

THE WITNESS: We handle the whole Kellogg line of cereals. It is a very popular line with the grocer.

RDQ. 155. If you had the word under oath of the sales managers of Kellogg that they give no advertising allowances to the chain stores, would you not be inclined to accept that?

A. Well, from the sales manager?

Mr. Vn.as: You hesitate, do you not, Mr. Helmers?

A. Well, I do not know. We have Mr. Barton come in, and he will say positively they do not give any allowance.

RDQ. 156. Did you understand what I mean? If they testified under oath, do you think they would perjure themselves about it in an organization of that kind?

A. Oh, I would think I would take it for granted that they did not.

THE WITNESS: In connection with loss-leader sales of Kellogg products, it is natural that they do not

want to sell anything at too low a price. I told you I thought, where chain stores were advertising shredded wheat for a very low price. They may have had some concession from the National. I do not say on that one item. It might be shredded wheat, or Kellogg's, or Campbell's Beans, or a hundred different items.

Those concerns with which we are affiliated give dealer advertising and co-operation to Kellogg's Whole Wheat Biscuit, advertising, window displays, and so forth.

I believe Rolled Oats is the largest seller in the cereal line. In dry, ready-cooked cereals, I think Kellogg's Corn Flakes is the largest seller. Niagara shredded wheat has never anywhere near compared to them in volume. Compared with corn flakes, shredded wheat has always been a small seller. We handle Niagara shredded wheat in one-dozen cartons, wrapped in good heavy paper. We also handle them in three-dozen cases, also packed in a cardboard box. I have not noticed the word original on the shredded wheat cases since Kellogg came into the field.

The proportion of sales of Kellogg's Whole Wheat Biscuit and Niagara shredded wheat through our house is about five cases of shredded wheat to one of Kellogg's. We serve the entire city of Cincinnati and a few outlying districts. Our dealer members advertise. About thirty-six of them advertise with handbills. None of them uses newspaper advertising or anything of that sort.

RE-CROSS-EXAMINATION.

THE WITNESS: My house does not pay \$1.20 a dozen for shredded wheat. That is the price to the retailer. If a national chain were able to purchase shredded wheat at the same price at which we purchase it, they could retail it at ten cents without any advertis-

15

ing allowance. They might do it any way. They might do it without the necessity of making advertising allowance or making a loss-leader of it. The trade knows that, on many items, the retail trade purchase direct from the manufacturer at the jobbing price. From what I can understand they all do. A national chain like the A. & P. is its own jobber, has its own warehouse, and acts as its own wholesaler.

We do not purchase corn flakes in great quantities. Pool cars come into Cincinnati. If we need anything in the Kellogg line, it is placed in that pool car. I have heard of Kellogg's Corn Flakes being sold at a low price as a loss-leader sometimes. It is a very popular item. In competing with that, it is like everything else. The wholesaler and retailer must work on a close margin to bring out that loss-leader. The price on corn flakes and shredded wheat would be about the same to us, on a regular. When I speak of specials on Whole Wheat Biscuit, I mean a cut price. If we would sell it to the retailer for a loss-leader, we would work somewhat closer. In ordinary dealings, the margin is about the same.

Mr. Clarke: For the purpose of avoiding recalling the witness Harry J. Helmers to the stand, it is stipulated that, if called, he would testify that, in the last year, his purchases of Whole Wheat and of shredded wheat have been one hundred sixty-one cases of Whole Wheat Biscuit and two hundred fifty-nine cases of shredded wheat biscuit, the figures being computed on the basis of both cases containing the same number of packages, viz: two dozen packages each.

Mr. VILAS: Yes.

NORBERT THIEMANN.

Deposition taken at Cincinnati, Ohio, March 21, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am president of Thiemann Brothers, Inc., wholesale grocers, mostly a cash-and-carry outfit. We have some credit accounts, but mostly not. All our business is done over the telephone. We have about thirteen hundred accounts. We serve greater Cincinnati and surrounding country towns. We handle both Kellogg's Whole Wheat Biscuit and shredded wheat. We sell about three-quarters as much Whole Wheat as we do shredded wheat. When people ask for shredded wheat, we give them shredded wheat. When they ask for Kellogg's Whole Wheat Biscuit, we give them that. As time goes on, the demand for Kellogg's biscuit is getting greater. It seems to be growing faster than the other. I attribute that, in our particular business, to the specialty work of Kellogg with the trade. There was a time when I was there and we did not have the original or Niagara shredded wheat. I believe, some time back, the jobbers could not get it. National was going to deliver it from trucks. Some of our customers would not buy it from National, and they came around and sold to the jobbers again. The National Biscuit Company wanted to deliver it to all our members, we understand, in lots of three to six packages. Relations have been re-established with the jobber. We have been handling it again for a couple of vears.

We have no confusion in our organization between the original shredded wheat and Kellogg's biscuit.

Cross-Examination.

THE WITNESS: When I say we have no confusion, I mean in our organization. We know the products

apart, and we know what a customer wants when he calls for shredded wheat. I have been in the business ten and a half years. We have carried shredded wheat all that time, when the National was selling it direct; also when we first started out, we started from scratch. We are former newsboys and farm boys, and we started from a little up, taking on products as we were able to. It is safe to say that one of those items was shredded wheat, about five and a half years back.

XQ. 31. You knew there was such an article as that before that, did you not?

A. Oh, shredded wheat? You bet I did.

XQ. 32. That is a very old article?

A. Yes, that is a real old one.

The Witness: I probably have not tasted either one. I do not like baled hay. There is no dispute that a lot of people like it. They like wheat products. Lots of 'hem call for it. Other people call up and ask for Kellogg's Whole Wheat Biscuit. We have about thirteen hundred telephone accounts, and the larger part of our business comes in over the telephone, all of it. We only use a man to collect money and to get dead checks honored. When it is ordered over the 'phone, we deliver it and get cash. A lot of it is called for right at the plant, about fifty per cent.; and the rest is hauled out in the rural districts, and the farmer may go and get it. He comes right to our door and pays for it in cash and takes it away.

RE-DIRECT EXAMINATION.

THE WITNESS: I would say the National Biscuit company does not put as much effort behind the sale of shredded wheat as does the Kellogg Company behind its Whole Wheat Biscuit.

RE-CROSS-EXAMINATION.

THE WITNESS: I will not say that the old Shredded Wheat Company did not, in past years, put much effort behind their products; but, in this field, Kellogg puts up more effort and has all the time we have been handling it. We carry the full Kellogg line. When I spoke of their specialty men efforts, I meant in pushing their whole line, including the biscuit. Their biscuit business is increasing. The Shredded Wheat Company hurt themselves when they took it away from their jobbers. I would not know about the original start of shredded wheat or the advertising of the Shredded Wheat Company when I was a young boy. They came back to the jobbers, because the individual merchants would not buy the product in some instances from the National.

RE-DIRECT EXAMINATION.

RDQ. 56. Mr. Thiemann, before you came on the stand, I asked you about the proportion of the sales of this shredded wheat and the Kellogg's, and you told me that you sold three packages of Kellogg's for every one package of shredded wheat. Is that what you meant to say on the stand here?

A. Yes. By that I mean that we will sell twentyfive cases of shredded wheat and we will sell seventyfive of Whole Wheat.

RDQ. 57. Of Kellogg's†

A. Yes.

RDQ. 58. And is that what you thought you said on the record?

A. That is what I intended to say. I said onequarter to three-quarters, I think I said.

Mr. CLARKE: That is all.

RE-CROSS-EXAMINATION.

By Mr. VILAS:

RXQ. 59. Yes, and then, after you left the stand and went out in the hall with Mr. Clarke, will you tell us what happened out in the hall?

A. He just asked me what I meant by that and I told him then in figures that I mean twenty-five and seventy-five.

Mr. VIIAS: Yes.

RE-DIRECT EXAMINATION.

THE WITNESS: You just said to me in the hall that you had asked me to say what the proportion of it was and I had told you before I went on the stand we had sold three times as many. Then you asked me if that was what I thought I said on the stand, and I said yes.

RE-CROSS-EXAMINATION.

THE WITNESS: I came back to correct what I had said before, so it would not be confused.

NICHOLAS DIEHL.

Deposition taken at Cincinnati, Ohio, March 21, 1933.

DIRECT EXAMINATION.

The Witness: I am a retail grocer, with four stores, at 5109 Vine, 2101 Vine, 3951 Spring Grove, and Gest and Wilder. They are considered up-to-date stores in the general grocery line, self-service type, one of them; and the others are semi-service and semi-self-service. I handle Kellogg's Whole Wheat Biscuit, and have, roughly, I would say about six months. We carry it in all four stores. We handle also National shredded wheat. One goes under the name Whole Wheat and the other shredded wheat in our stores. We have no confusion between them whatsoever, and the housewife has none. Kellogg's Whole Wheat Biscuit sells more in our stores, about three to one.

Kellogg Company asked me about three or four weeks ago to give them a list of names that they wanted

to send out postal cards to. He sticks up circulars, display cards, and asked me about floor displays, in which we co-operate because they always co-operate with us. Whole Wheat and shredded wheat sell at the same price. We use the cellophane-front package like Plaintiff's Exhibit 161, which is what created our sale. That really distinguishes the line of cereals from the other one by the cellophane front being in it. Since we had them I have used them every morning myself. Behind my desk I have a half pint of cream and I use two of those biscuit. If someone does not know what they are, I show it to them. I think, seeing the name Whole Wheat Biscuit, they do not know what they are unless the cellophane front was put in. I have had some people tell me they did not know what it was. Some of my clerks tell me they have never used them until they saw them in stacks on the floor. I have never used either kind before. I give the Kellogg Company dealer co-operation in display space and window display. I always do. I have not given space to it in the newspapers but on hand-bills. We have featured Whole Wheat Biscuit all the time. I think I have it on this week's circulars. We get no manufacturer co-operation at all from National Biscuit Company in selling shredded wheat biscuit, because we cannot buy them right, in the first place. You cannot buy them on trade discounts. They are selling them for nine and eight cents. We cannot sell these for nine cents and meet them. We feel we can buy Kellogg's right but not the other. I am not on the same basis as the large buyers. I feel National is giving better prices to the large buyers than to me. I know it, because they get seventeen and a half, and I could not get it. There is a demand for Kellogg's Whole Wheat Biscuit in our store, an increasing demand in all shredded wheat products. I used to sell one box a month of shredded wheat, and now we sell about six bexes, altogether, of shredded

wheat. The one store in particular where I am sells between four and five cases a month Whole Wheat Biscuit, and we still sell our one case of shredded wheat biscuit. We sell five to six cases a month of Whole Wheat Biscuit to one of shredded wheat in my store. We give Jack, the salesman who calls on us, his case every month. That goes out as regular as clock-work. That is just the one store.

CROSS-EXAMINATION.

THE WITNESS: Shredded wheat sells. In our store, we have five cases of Kellogg's and one case of shredded wheat a month, just in one store. I said we sell Kellogg's three to one in our four stores. That is clear. Shredded wheat is in larger cases. Each store buys individually. Of the Kellogg's, for all four stores, I would venture to say about twelve cases a month, and about three cases of shredded wheat with thirty-six to a case per month in all four stores. The store I am in sells a case a month. It does that despite the fact we do not push it or have co-operation. We do not feature it. In three of the stores both kinds of biscuit are right together. In one store, they are in a different spot. Sometimes we have floor displays for Kellogg's and window displays. The salesman comes around and does that. The shredded wheat is not especially displayed. They can help themselves to it. It is on the shelf; but it is not featured on a window or floor display. We do not put it up unless the salesman comes around and puts it in. Notwithstanding that, we have customers who demand or help themselves to shredded wheat. They come in and ask for them. When they do, I do not necessarily show them Kellogg's Whole Wheat Biscuit. If I have not got it, I could.

We tell them there is a whole wheat biscuit made like it, with more in a box, and so forth. If I would

have it, I will take it from the back and show them what it is. The cellophane front is our display. They see the biscuit through the cellophane front of the package and help themselves or ask for it. They can see the picture of shredded wheat on the shredded wheat package. I will not buy anything from a picture, only what I see. I know of no other products having a cellophane front window. It is hard to think of any cereals having cellophane fronts, the same as Kirkman's soap chips have right now. I would not hesitate to buy Kellogg's Corn Flakes. I was raised on them. In general, I knew what they were; but most people do not know what shredded wheat is. We have some very smart people in our trade and some very dumb people. I have had them come in my store and not know what a string bean is, so there is nothing new about their not knowing what shredded wheat is.

The Kellogg salesman did not ask me for a list of my customers who use shredded wheat. He asked me if I wanted to take on the Whole Wheat Biscuit and give him a list of my customers. I gave him a list of my people that I send to. It is our mailing list, but, due to a flood of orders and everything, we have not had a chance to get it ready for him yet. So we have not had this competitive campaign on Whole Wheat Biscuit yet. He asked for it a while back. I have not yet given it to him. He delivered them to me, saving the cost of delivering them. He is willing to give me displays or demonstrations at any time. He made displays of them. They have salesmen, and they sent them over when that preliminary was on. Sometimes he would let him run the displays. He would even sometimes make them. We have had deals on, where they would sell one package and give away one package. I think that was when we first handled it. I think three packages were sold at regular price and one package Whole Wheat Biscuit was given away free. I do not remember whether the free package was purchased from me or not.

I buy my shredded wheat direct from the National Biscuit Company. I carry some of the National Biscuit crackers, not all. My cracker purchases together with shredded wheat do not give me a full discount. I am not a member of a voluntary chain. I belong to the Cincinnati Wholesale Grocers' Association. They were just put on the list for seventeen and a half per cent. discount. I can buy shredded wheat through them now. right; but that just started the first of the month. I do not know and I do not think I can buy shredded wheat from now on at as favorable terms as the chain stores can. I believe the chain stores get a special deal from the Biscuit Company, although I cannot prove it. I know what you mean by a loss-leader. It is possible the chain stores have loss-leaders. I would not think they would sell it below cost. I think it is against the law to sell below cost. When I ran a special on any product, they told me it was. I can sell Kellogg's biscuit for nine cents and break even.

I have been in the grocery business about five and a half years. In the early part of that business, before National had taken over shredded wheat, I carried shredded wheat and bought it through the jobber. We did not then have Kellogg's Whole Wheat Biscuit to compete with. We had no shredded wheat biscuit at that time, except shredded wheat. There was very little consumer demand for that at that time. We sold it. People came and asked for it. I really think there is more demand today than there was then.

HENRY MUELLER.

Deposition taken at Cincinnati, Ohio, March 21, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer with one store, located at 3160 Jefferson Avenue, Coraville, Ohio, a suburb of Cincinnati. I am president of the Cincinnati Retail Grocers Association, treasurer of the Ohio Grocers and Meat Dealers Association, and a director in the Grocers Mutual Fire Insurance Company of Ohio.

In our store, we handle the product known as Kellogg's WholenWheat Biscuit, in closed packages, like Plaintiff's Exhibit 167. We have not handled any of the cellophane fronts, like Plaintiff's Exhibit 161. We also handle National shredded wheat. Of the two, I am selling more Kellogg's Whole Wheat Biscuit, about three to one.

Q. 16. How are those products asked for in your store? What do they call them?

A. They just come in and ask for shredded wheat.

Q. 17. I mean, what product do you give them when they ask for shredded wheat?

A. We give them Kellogg's.

The Witness: Some of the customers who want Kellogg's say they want Kellogg's. Others just mention: "Give me a package of shredded wheat," the same as a customer coming in your store and saying, "Give me a loaf of National Biscuit bread," and others will say, just, "Give me a loaf of bread." People ask for shredded wheat, and I show them both packages and explain the difference between the one and the other. We have telephone orders for the Kellogg product, and also for shredded wheat.

Q. 27. When you get an order for shredded wheat over the telephone, just what do you do?

A. I send out Kellogg's.

Q. 28. You send out Kellogg's?

A. Yes, sir; unless they designate that they want the National Biscuit Company product. Then, we give them the National Biscuit Company's shredded wheat.

We explain to them and we give a little explanation. We do not just send it out that way. We tell them we have a new whole wheat biscuit, that they can try them, and, if they are not satisfactory, they can return them.

The Wirkes: We have never had any people return the Kellogg product. We do not substitute anything in our store. If we do not have an article for a customer, we go out and buy it for him. We never substitute.

From the Kellogg Company we get co-operation in promoting the sale of Kellogg's Whole Wheat Biscuit, by window displays, counter displays, and literature which we put in with orders and give to the trade as they come in the store. We do not get that same kind of co-operation from the National Biscuit Company.

Kellogg's Whole Wheat Biscuit business is increasing in our store. I find there is a consumer demand for the Kellogg product in our store. It is growing each day. We buy National shredded wheat from the Cincinnati Wholesale Grocery Company. I cannot say whether it is sold at the same price to chain stores and independents. I can form my own opinion, but you hear a whole lot that is not so. Although I have been in the grocery business thirty-six years, I cannot understand how the chain stores sell National Biscuit shredded wheat at ten cents. I have seen it on a tag in the window while waiting for the street car in years gone by. I could not understand how they could do that, when it was costing me ten cents. Nobody can work for nothing and pay expenses. You can get a price on Kellogg's, about ninety-five cents a dozen.

National is about a dollar-fifteen. The chains are selling the National at ten and Kellogg's at twelve. That is something to understand. The one costing less they are asking a bigger price for. There certainly must be a nigger in the wood-pile, somewhere.

CROSS-EXAMINATION.

THE WITNESS: I have no grievance against the National Biscuit Company whatever. I carry about ten per cent. of their crackers, because we have a consumer demand for them and have never substituted. We do not push the National cracker. We are salesmen and sell anything good. We do not push them, because I could never understand why the National Biscuit Company lets other cracker companies give the retail grocer seventeen per cent, on a certain amount of goods. Just recently in the last four weeks, the National recognizes the wholesale grocer's discounts, but not in the twenty or thirty years gone by. I do not think I can buy them through the Cincinnati Wholesale Grocery, but I suppose they will go out and get them for me. As I am a member, I am buying Strietmann's and Loose Wiles goods at seventeen and a half per cent. discount, regardless of the amount. I can buy direct from the National Biscuit Company now, regardless of the amount; but that went into effect only about four weeks The dollar-seventeen price I gave on National shredded wheat, is without the discount off. That is down to a dollar-ten. Then add on to that two per cent. I get it for a dollar-ten with the seventeen and a half off, a difference of about seven cents a dozen. I am buying Kellogg's at about ninety-five cents a dozen. I make more money on Kellogg's than on National shredded wheat.

It is natural with the push I am giving the Kellogg product and the co-operation they are giving me, that the sales of Kellogg's biscuit should increase in my store. I am for anything that makes a profit to me. I am in business for Henry Mueller, not the manufacturer. If I would get a better profit from the National, I would push their goods. I told their salesman it surprised me the National did not fall in line with others. He said there was talk about it, but it takes time.

When somebody asks for shredded wheat, I give them Kellogg's, unless they insist on National shredded wheat, and explain to them there are more biscuit. that they are smaller, and, at the same time, it contains half an ounce more. I think that is a good selling point, and I succeeded in most cases. We have some customers, however, who say, "No, I want shredded wheat." I do sell shredded wheat. Having been in business over thirty-six years. I have sold lots of it. Until Kellogg came on the market with Whole Wheat Biscuit, we had good sales of shredded wheat. Until then, we had nothing else like it, to take its place. I never like to sell anything I cannot make a living profit on. Now that I have a chance to sell this small biscuit, with more in the package, and make a little more money, I am pushing that. I push anything else there is money in, too. I do not regard that as substitution, because I really explain it to the customer. We are willing to have them take it and bring it back if they do not like it. I think that is salesmanship. That is not substitution in my mind, because what I call substitution is this: If a person orders, for instance, Heinz' Ketchup and we send them Ritter's Ketchup, that would be substitution. If they order shredded wheat and I send them Kellogg's, not telling them about it, as long as I explain to them that it is not shredded wheat, that it is Kellogg's Whole Wheat Biscuit, that is perfectly legitimate and all right, I think. I make a little more money on it. The National Biscuit Company suffers for it. That is natural, I suppose. Take C & H package Coffee, they say, "Why not carry our coffee!" I say.

"No, there is no money in it. I push Henry Mueller's coffee. Give me some prices and profit, and I will push it."

When a person calls up and asks for a loaf of bread, we give them whatever we have the most of. If a customer says, "I want the National product," you bet your life they get it. If we have not got it, we send down and ge. It for them. That applies to butter and everything. A certain part of the trade demands a brand. Others, so long as the quality is there, are not particular what brand it is.

BAYMOND, J. LIPPERT.

Deposition taken at Cincinnati, Ohio, March 21, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a grocer, with a store of my own under the name of Raymond J. Lippert & Company, at 621 Monmouth Street, Newport, Kentucky. It is a service store. As to some of the goods customers can wait on themselves; as to others, they cannot. It is a medium-sized store. We have had it seven years.

We handle in the store Kellogg's Whole Wheat Biscuit, in a closed-front package, like Plaintiff's Exhibit 167. We have handled it at least four or five years. There is a consumer demand in our store for it. As far as I know, people ask for Kellogg's shredded biscuit or Kellogg's Whole Wheat Biscuit. I do not know whether they put the whole in there or not.

We have handled the National product, shredded wheat, but not now. We stopped handling it because the demand seemed to subside. It just sort of died out in our place. We had biscuit on hand. The demand was gradually getting less, and it just seemed it was

not moving fast enough. It began getting old and dusty, so I discontinued ordering it. I did not give any thought to what caused that. I am not interested particularly in Kellogg or the National. If an item dies out, we are not interested in finding out why. We would just replace it in favor of other stuff. After it was taken over by the National, it seemed there was less aggressiveness on the part of the company in pushing it. That is just a thought. I do not know it. I think the Kellogg Company aggressively push the sale of their Whole Wheat Biscuit. We do not feel that Kellogg fails to push it. For one thing, I am solicited more often by salesmen. That is one big thing, the salesmen coming around and keeping after it. They have displays. We have given them space for window displays. We have arranged them together. They supply the display matter. I do not know that they ever put any in for us. We ask to be allowed to do that ourselves. They will do it, if I want it. We have had store sales. Our store is comparatively small for the business we are doing, and we do not go in for extra displays, such as they might like to put out. We have had extra displays put up by the store men. We have had sales of the whole line of their products, including Whole Wheat Biscuit. We advertise in the papers and have advertised Kellogg's Whole Wheat Biscuit. We never had any advertising allowance from the Kellogg Company on that. In general, we do not practice substitution in our store. There might be a rare case where we might use our judgment putting in an article we think might be used by the consumer in place of the one he ordered. In that particular case, I suppose that would be substitution. That would only apply in the case of a regular delivery order, when we could not ask about it. We never substitute in the store, where people are calling for goods and where we have any opportunity to ask

them about it. We may have substituted in rare cases on delivery, there being no opportunity to ask them. We sell, I imagine, two to five cases of Kellogg's Whole Wheat Biscuit a month. I do not know. I would say the consumer demand for that product is increasing.

CROSS-EXAMINATION.

THE WITNESS: I suppose it is about two years since I have ordered shredded wheat from the National Biscuit Company. We have been without it all that time. I think the handling of the two lines overlapped. We did not have them both at the same time. We did not put this in until the other was put out.

After I got the Kellogg kind in, it outsold the shredded wheat. At the same time, probably two years ago, shredded wheat ran out, and we did not order any more. When our customers asked for shredded wheat, we told them we have not got it. We do offer to sell them Kellogg's Whole Wheat Biscuit. We do not pass Whole Wheat Biscuit on an order for shredded wheat. If they ask for shredded wheat, we may say we do not have shredded wheat, but we have Kellogg's Whole Wheat Biscuit. That is our invariable practice on that item. We do not let the customer get away if we can help it. If they want a package of shredded wheat and we do not have it, we try to sell them Kellogg's. do not regard that as substitution, if a customer has the chance of choosing or deciding. We do not have very many telephone orders, just a few. It is mostly cash-and-carry. I know I do not just offer the Kellogg package in response to a request for shredded wheat. If the clerks are living up to their instructions and the general policy of the business, they do not. I do not think I know Mr. Donnelly, the gentleman at the table here. I do not think I ever saw him in my store.

XQ. 61. Would you be surprised if I told you that, about a week ago, Mr. Donnelly asked for shredded

wheat biscuit in your place and was handed a package of Kellogg's Whole Wheat Biscuit?

A. Without any explanation?

XQ. 62. Without any explanation, yes.

A. Yes, I would.

XQ. 63. You would not say it could not happen, would you?

RE-DIRECT EXAMINATION.

THE WITHES: I would say, in explanation of this incident, if it did actually happen in my store that the clerk, in handling or suggesting or getting down and handing out a package of Kellogg's to Mr. Donnelly, assumed he could see there was a difference. If he objected, he would say so, which he did in that case. She was not trying to deceive him.

I am not prepared to say whether, physically speaking, the product she handed out to him is a shredded wheat biscuit or not. I suppose it is.

BE-CROSS-EXAMINATION.

THE WITNESS: I do not know particularly what this case is all about, I just know there is some dispute between the National Biscuit Company and the Kellogg Company about shredded wheat. I have known the product you call shredded wheat quite a number of years. There was a time when that was the only product of that kind on the market that we carried.

RE-DIRECT EXAMINATION.

THE WITNESS: In the incident just related with regard to Mr. Donnelly, he said that, as a mester of fact, he did not take the biscuit offered him. He just explained that to me off the record.

GEORGE W. SCHWAGER.

Deposition taken at Cincinnati, Ohio, March 21, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am manager of the Otto Depenbrock Company. We are recognized by the manufacturers as the largest wholesale and retail grocery. We have a retail department. We are the largest wholesale house in Campbell County. We have retail outlets all in Kentucky. We have one very large store in Newport, and one in Bellevue, one at Cincinnati, at Finley and Linn Streets, under our jurisdiction. Depenbrock, as a whole, is a large family. There are also chains of Depenbrock over in Kenton County. There were two brothers. Otto and Henry. The two brothers died. The businesses were handed down to the sons. Those in Kenton County are owned by Henry Depenbrock's boys, and the business in Campbell County is owned by the widow, Mrs. Otto Depenbrock. That is the organization with which I am connected.

We handle Kellogg's Whole Wheat Biscuit, like Plaintiff's Exhibit 167. I am in a position to say there is a consumer demand for that product in our retail outlets. They also handle the National shredded wheat biscuit. Of the two, Kellogg's sells most, I would say, in our retail outlets. Offhanded, I would say it sells about two to one. I have no connection whatsoever with the trade. The policy in our store is that we have nothing but nationally-advertised brands. That is our aim, and we sell only the brands specified by the customer. If a customer comes into our store and asks for Whole Wheat Biscuit, the clerk would ask her what she wanted, and she would have to say either National or Kellogg's. That would be true if the customer said shredded wheat.

We handle some shredded wheat, but we do not handle any other National Biscuit Company product. We have eighteen or twenty clerks in the store on Saturday. This time of the year, with business as it is now, we have nine during the week. We have a large neon sign in our store, for Kellogg's Whole Wheat Biscuit, used in connection with floor displays. Not more than three or four weeks ago, we had a very elaborate display, and the Kellogg Company thought well enough of it to come over and take a photograph. We also have window displays. We have had window displays of Whole Wheat Biscuit of Kellogg. We do newspaper advertising a have referred to Kellogg's Whole Wheat Biscuit in our newspaper ads.

We get a cent more for National shredded wheat than we do for Kellogg's biscuit. Kellogg's is ten

cents, and shredded wheat eleven.

CROSS-EXAMINATION.

The Witness: I would not say we have never carried National crackers, but not in three years I have been there. That is my whole experience in the grocery business. I am business manager of the stores. My attention is given to the entire works, wholesale and retail. Everything is under my supervision. My head-quarters are 915 Monmouth Street, Newport, Kentucky. I hold meetings every Thursday night with all my clerks, to further the sale of merchandise. I do not actually move packages across the counter. I am not in the retail store; I am in the office. I am out through the store, pass through there probably many times in the day.

I do not know how it happens we carry National shredded wheat. We do not carry it all the time, have none right now. We have not had any for two weeks. We are out of it more often than we have it. I have

no answer for why we carry it, because I have no desire to carry it. We have to have all nationally-advertised brands, so we have to have some National shredded wheat. It is positively fair to say that we carry it because we have some demand for it. That is the answer to it. If we did not have a demand for it, we would not push it. We do not push it now. I am not particularly friendly to the National Biscuit Company.

Ours is a cash-and-carry, semi-service store. We are on the same plan as Kroger's Government Square Stores. Some things you can pick off the center tables, but you cannot get behind a counter to serve yourself. We sometimes find shredded wheat on tables in the center and sometimes Kellogg's Whole Wheat Biscuit.

We have trade ordering over the telephone. It is no different over the telephone than it would be over the counter. You would have to designate what you wanted. I would not know what you wanted if you asked for shredded wheat. We do not make any effort to send anybody anything they do not want. If they say shredded wheat, we have what they want. You would have to say Kellogg's or National, notwithstanding that we have a package in our store on which the only designating name is shredded wheat. We do not recognize we have two packages, either of which would fill that order, if the customer specified it. If a customer designates which of the two packages she wants, fully. We do not know which she wants, and we would not fill the order or accept it, until she designates which. We do not vary in any way from that practice. We have clerks, and they are human. If Lever catch them doing it, there is a different story attached to it.

Supposing at the present time there is a shredded wheat made by the National Biscuit Company, I do not ask them what they want. If they ask us for shredded wheat, National, and we are out of it, I tell them flatfooted we are out of it. If one of my clerks, when a

call came for shredded wheat, would pass out a package of Whole Wheat Biscuit, they would be going against the rules. It could happen. I would be greatly surprised if told it actually did happen within a week in my store.

The neon sign in my store says: Kellogg's Whole Wheat Biscuit, just like that box. That is prominently displayed in my store from time to time. It is an attractive display and attracts customers. I would say that this and other similar displays we use on Kellogg's biscuit have resulted in creating a demand for it. Speaking of outselling shredded wheat two to one, it is safe to say that that sort of display and pushing would have that effect. We have had it on other sales promotion and books and coupons have been given out. I would say the increase of Kellogg's over the National is accountable for by promotional work. We make no attempt to push the National, never put them out on display, just put them on the shelves, until somebody asks for it. We sell it a cent a package higher than Kellogg's. We have to, because it costs us practically ten cents. We buy it as a jobber. We are supposed to be on the same basis as the larger stores, chain stores, but they can buy it and sell it for a dime. We cannot. We buy five or ten cases at a time and get the regular jobbers' seventeen and a half per cent. discount. Still I say we cannot sell it for ten cents.

RE-DIRECT EXAMINATION.

THE WITNESS: National shredded wheat is offered on the market in competition with me at ten cents lots of times. It has been that more often than any other price. We cannot meet that competitive price.

RAYMOND P. BLANK.

Deposition taken at Cincinnati, Ohio, March 21, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer, under the name of Charles J. Blank, the business of my dad, my brother, and me. We have just one store at 350 Warner Street, considered a large store. We have seven clerks, sometimes eight, when we are busy. We have most of the displays in front and some on shelving behind the counter. Special displays are in front. We have window displays in two ten-foot windows and one six-foot window. It is an old line service store, taking orders and extending credit, making deliveries, and taking telephone orders.

We handle Kellogg's Whole Wheat Biscuit, like Plaintiff's Exhibit 167. We do not carry it in cellophane-front packages like Plaintiff's Exhibit 161. We also handle the National shredded wheat, in the new style package, with purple grass in front of the building. Most of it comes to us in packages like Plaintiff's Exhibit 1.

Of the two products, we are selling about two of Kellogg's to one of shredded wheat. If a customer asks for shredded wheat or wheat biscuits, we usually ask if they want Kellogg's or the National. The customer most of the time asks for prices. If we happen to be selling Kellogg's a little cheaper than the other, they usually take the low-priced package. Our retail price is ten cents for Kellogg's and twelve cents for shredded wheat. I have seen shredded wheat advertised for ten cents time and time again. We could not very well sell it for that.

We have handled Kellogg's Whole Wheat Biscuit since last fall. A customer called up and asked

me for Whole Wheat Biscuit. I sent her shredded wheat biscuit. She said I was not sending her the right thing, that she wanted Whole Wheat Biscuit. I never knew they had Whole Wheat Biscuit before. I inquired at the wholesale house, and they said that Kellogg's had a whole wheat biscuit. I ordered them and sent her a package. She said that is what she wanted. There is some demand for them. We stacked them up in the store, put a ten-cent price on them, and they sold readily.

The Kellogg Company sometime ago, gave us some signs, and they also had a little window display in a small side window. We do not like to give them a big one, because we use it for ourselves. We have not had a neon sign. I would use one if they gave it to me and it did not consume too much "juice." I would put in anything that helps sell the goods.

CROSS-EXAMINATION.

THE WITNESS: I think the difference in price is the principal attraction to the consumer in our neighborhood. Our customers often ask for shredded wheat. Lately, they ask for whichever one they want. Some of them call for Whole Wheat Biscuit. They do not all call for shredded wheat. We do have calls for shredded wheat. We invariably ask them which one they want. The girls are instructed to ask whether they want National or Kellogg's. It would not do in our locality or in Newport, at all, to simply send or hand them Kellogg's without making any explanation. Our people will not stand for that. If they want Maxwell House Coffee, they want it and we cannot give them anything else. That has only been true since last fall when we put in Kellogg's biscuit. Before that, when they asked for shredded wheat, I knew what they wanted.

I have handled shredded wheat in our store and my father before me handled it for many years. Before that, when people asked for shredded wheat, I knew what they wanted. There was nothing else to ask for but that, until there was a competitor. In one sense Kellogg's Whole Wheat Biscuit could be looked at as a competitor now of shredded wheat made by the National Biscuit Company. In another way, it is a different size. Some people like a smaller one. That very difference in size is a competitive feature. It looks like it. We have been using it for a talking point. When we tell them they are smaller biscuits, some people take it for that. I would not say that Kellogg's biscuit supplants the shredded wheat. We are in a price neighborhood, and the price of it takes it.

Some people ask for corn flakes. They do not mean corn flakes, but, after you suggest the item to them, they take it, too. They do not always buy this shredded wheat biscuit because they want shredded wheat. It is just the way you approach the customer. If they ask for breakfast food and you grab a package and show it to them, they are very likely to buy it. I have used Shredded Wheat for a long time. A customer comes to me like that, and I will say "Which one do you want?" The three best customers for Kellogg biscuit have bought them since we had them stacked on the counter in the store. Before they bought Corn Flakes. They buy about six packages a week. I took particular notice of them. I would not say. there were not many who used to buy shredded wheat, who now buy Kellogg's Whole Wheat Biscuit. I would say there are half a dozen of them, anyway,

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ANDREW PATRICK BARTON.

Deposition taken at Cincinnati, Ohio, March 21, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am salesman for the Kellogg Sales Company. My territory embraces Hamilton County, of which Cincinnati is the county seat, and about twenty adjoining counties. I am principally a jobber salesman, calling on institutions and retailers. my duties embracing the promotional work on the whole Kellogg line, holding store demonstrations, merchandising our products as we contact the trade with premiums and things like that, and selling our products. The articles in the Kellogg line are Corn Flakes, shredded wheat-or Kellogg's Whole Wheat Bisonits, Rice Krispies, Pep Bran Flakes, All Bran. Whole Wheat Krumbles, and Kaffee Hag coffee. I travel the wholesale trade soliciting orders for that product, and I work right in the retail trade.

In promotion of sales of Kellogg's Whole Wheat Biscuit to the consuming public, we have had the Wheel of Knowledge, used in merchandising Whole Wheat Biscuit, giving one free with every two packages of Whole Wheat Biscuit: have had store demonstrations, pointing out the merits of our product. We have had attractive restaurant displays, showing ours is a smaller biscuit, fitting the cereal bowl. We have store displays, neon signs, and window posters. We have window side-bills of Whole Wheat Biscuit. We have done house-to-house work, sampling to the consumer. I have worked the coupon postal cards. We get lists from the grocery store and mail a coupon out to that list, telling them they can purchase one and get one package free. These methods have been effective in creating consumer demand to the retail trade.

we have shown an increase each month for the last six months.

I work in the restaurant trade. They use the individual size. In my territory, I would say the Kellogg biscuit has had a distribution of at least 50 per cent. to the restaurant trade. In the grocery trade, the stores I have contacts, I would say approximately 75 per cent. distribution.

The selling points we emphasize in pushing the sale of Whole Wheat Biscuit are that it is a smaller biscuit, toasted on top and bottom. It weighs a half ounce more to the package and there are more biscuit to the box. The smaller biscuit fits the cereal bowl better.

Cellophane-front packages are being packed with our goods for display purposes. The premiums, such as Wheel of Knowledge and others, also act as sales advantages or helps.

CBOSS-EXAMINATION.

The Witness: It is smaller than the other Wheat Biscuit on the market, by which I mean shredded wheat. In introducing the other package, they may ask what kind of shredded wheat it is. Of course, it is a shredded wheat biscuit, I presume. We point out the size of our biscuit. The comparison might come about through the grocery man. When we are showing our product with the cellophane front, or possibly an opened package, we will say: That is shredded wheat biscuit, and they will say: We have one shredded wheat biscuit. We may say: Our biscuit is smaller. I may bring out that fact.

When I say the biscuit is smaller, I am possibly comparing it with the shredded wheat biscuit already on the market. I presume our biscuit is in competition with the shredded wheat biscuit made by the Na-

tional Biscuit Company. I know it is in competition. I would not think some of the 75 per cent, distribution in stores is business taken away from the old shredded wheat, altogether. I do not know whether any of it is. Some business for shredded wheat is new outlets, I think. I do not claim a 100 per cent. of our sales are to new enstomers.

MRS. BERTHA McDOWELL.

Deposition taken at Cincinnati, Ohio, March 22, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife. I have two daughters. I use Kellogg's Whole Wheat Biscuit in the house. I do not recall exactly when I started but it is quite a bit longer than a few weeks. Mr. Welsbacher, my grocer, happened to be out of shredded wheat biscuit and recommended Whole Wheat Biscuit. When he recommends something, I usually try it. We did and liked it very much. 'We are very well satisfied with it. I like the biscuit because it is smaller and suits me better. It fits my cereal dish so much better. I used the other, like Plaintiff's Exhibit 1. before. We usually split it or broke a piece off it. I like the taste of the Kellogg better than the other. I continued using it, and my daughters like it very much.

We were out of it, and I called my grocer yesterday. He told me about the card with the coupon. When it came, I ordered the two boxes of Kellogg's biscuit for the price of one. A gentleman came to my home, told me Mr. Welsbacher had sent him, asked if I was a user of Kellogg's biscuit, whether I liked it, and why. He then asked me if I would come down here today and tell about it. He was a perfect stranger

to me.

CROSS-EXAMINATION.

THE WITNESS: The first time I get Kellogg's biscuit. I had been using shredded wheat biscuit, off and on, for some time. I have not gotten any whatever since I started using Kellogg's Whole Wheat Biscuit. I have known shredded wheat many years. It is a very old product. My mother-in-law used it right along. She lives on it today. It has been on the market quite a while and is a well-known product. I only used it occasionally. I had known it for some years before I ever saw Kellogg's Whole Wheat Biscuit. Up to that time. I had been buying and using it from time to time at my grocers, shredded wheat, like Plaintiff's Exhibit 1. When the grocer showed me Kellogg's biscuit, I was in the market for shredded wheat then. I asked him for shredded wheat. I do not remember whether he was out of shredded wheat; but he recommended Kellogg's, said he had a new kind of shredded wheat on the market. I tried it and was very well pleased with it. I was on the telephone. He calls me up. I have kept on using it since then. That was less than a year ago.

RE-DIRECT EXAMINATION.

THE WITNESS: When I ask for Kellogg's on the telephone now, I tell them I want Kellogg's Whole Wheat Biscuit. I specify that. My grocer is F. J. Welsbacher, whose store is on the Pike, Montgomery, Road.

MRS. JULIA KUHN.

Deposition taken at Cincinnati, Ohio, March 22, 1933.

DIRECT EXAMINATION.

The Witness: I am a housewife with eight children, and I use Kellogg's Whole Wheat Biscuit all

the time. I have used it about two years. I first came to know it by seeing it advertised. I tried it right away and liked it very much. I used shredded wheat, in a box like Plaintiff's Exhibit 1, many years before. When I tried Kellogg's biscuit, I thought it was about the same. I used practically all Kellogg's since. It is nice and crisp, uniform to serve small children, not so large. Everyone likes it, all the children. I always get it, have some on my shelf right now. I use about two boxes a week. When I order it, A say: Kellogg's shredded wheat. My grocer never substitutes or tries to. If he does not have it, he will call back, tell me and ask if I wish anything else. The name Kellogg's on the package means something to me. It is very attractive and I think it is healthful for the children to serve any of their products. I had used whole wheat called All-Bran, and I use Rice Krispies, and the crackles.

CROSS-EXAMINATION.

The Witness: I have had shredded wheat like Plaintiff's Exhibit 1 for many years. I have known and used it about fifteen years. Before Kellogg's Whole Wheat came on the market, there was nothing else like it at that time. I always had shredded wheat in the house and bought it almost every week. My family consists of my husband and eight children. I serve shredded wheat every other day or so to them. Berkey is my grocer. I used to go in there. Since I moved away, he delivers everything for me. I have dealt with him twelve or fifteen years. All my orders are by telephone.

I only buy shredded wheat, like Plaintiff's Exhibit 1, if he is out of the other. So I still use shredded wheat sometimes. I think I first saw Kellogg's Whole Wheat Biscuit advertised on a little card or slip the grocer sent me. I saw it and thought I might try it.

I do not remember what the au said. It was something new, which was what attracted me. It is quite a while back. I went down to the grocer, bought them, and have been using them since.

I might have received last summer a sample of shredded wheat like this biscuit. If a sample comes in like that, the children usually grab it. I would not see it or know about it until I found the empty box. When they ring the bell, I am right there. I use the two products, one or the other.

RE-DIRECT EXAMINATION.

THE WITNESS: I prefer Kellogg's Whole wheat. I like the small biscuits better on account of the children. I came here today, because a man came to my door several weeks back. I had never known him before.

RE-CROSS-EXAMINATION.

THE WITNESS: My grocer is not a chain-store market, just a little fellow, not connected with any grocery chain. He and his brother have two stores. One is across the river.

MRS. ELIZABETH FORG.

Deposition taken at Cincinnati, Ohio, March 22, 1933.

DIRECT EXAMINATION.

The Witness: I am a housewife and have one son. I am a consumer of Kellogg's Whole Wheat Biscuit, having used that product the last couple of years. I buy it in packages like Plaintiff's Exhibit 167. I like it very much, because it is a small biscuit, just enough, no waste to it; toasted on both sides, and my family relish it very much. I have been using it right along since I first bought it. It first came to my attention

through a small sample left at the door. I liked the sample. I ask for Kellogg's Whole Wheat, because I have used all the Kellogg products. They just continued with Whole Wheat Biscuit.

My present grocer never substitutes with me. If you ask for what you want, that is all, because he thinks people want what they want, and he does not ask them to take anything else. He never calls new products to my attention. I came here today because a man came to my door, asked about Kellogg's, if we liked it. I had never seen him before.

CROSS-EXAMINATION.

THE WITNESS: I do not know how this man happened to get my name. He did not tell me he got it at the grocery store. He said he was a representative of the Kellogg Company, asked me if I used the biscuit, and I said yes. He asked me how I came to use it, and I said through a sample, and I continued using it. It was a small sample, a little box, left at my door.

Before using Kellogg's biscuit, I had used shredded wheat, years back. I recognize Plaintiff's Exhibit 1 as shredded wheat. I did not use that so much, because I did not favor it so much. I knew about it for some time. It is a very old product. I liked the Kellogg product because it was smaller and tonsted. I noticed the difference in the package. When I got to the grocery, I asked for shredded wheat. He had it. He had them both, Plaintiff's Exhibit 1, also. I started to buy the Kellogg product, along with the other Kellogg products I was accustomed to use. My grocer is Urban Lane, near my house, on Vine Street. I am on Rice Street. It is not a chain or cash-and-carry store. I telephone and get things sent over. My son and nephew are with me, and a baby of over five years, all users of Kellegg's biscuit. I serve it with cream and sugar, taking it out of the package in the kitchen and preparing it. I do

not warm it in the oven, just put it in a dish with cream and sugar on. It does not have to be in the oven, because it is toasted so nice on both sides.

MRS. RUTH GRUBER.

Deposition taken at Cincinnati, Ohio, March 22, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, with three children. I am a user of Kellogg's Whole Wheat Biscuit, which I have used about five or six mont's. I have used Kellogg's products a long time. I first became acquainted with the biscuit by going to my grocer and saying I wanted something for a breakfast food. He said there was a new food and he suggested I try it. I did and have been using it since. I like it, the double-toasted biscuit, gives it a nice flavor, and I like the convenient size. The children like it very much.

I have used shredded wheat like Plaintiff's Exhibit 1. I think I like the smaller one better, the size, and it has a better flavor, because of the double toasting. I have used other Kellogg products. I always go to the store myself. I order it as just toasted wheat biscuit, Kellogg's Whole Wheat Biscuit. My grocer does not, as a rule substitute. I came here today because a gentleman came to my door and asked me if I would. I guess he represented the Kellogg Company. I never saw him before.

Cross-Examination.

THE WITNESS: I assume my grocer told him my name. I suppose he gave him a list of his customers. Before I bought Kellogg's Wheat Biscuit, I had known shredded wheat. I have known it for a long time. It was a pretty well known product. When I was at the store and he suggested Kellogg's, I was not asking for

shredded wheat. I am pretty friendly with my grocer. I know him and his family. When they have something

new, they generally tell me about it.

When I bought shredded wheat like Plaintiff's Exhibit 1, I asked for shredded wheat. That is the only name I have ever known it by. I never knew the Kellogg product as Kellogg's shredded wheat, never heard it called that. My grocer carried both items. I asked him if he had anything new in the way of cereals, and he suggested Kellogg's biscuit. He said it was a new cereal at that time. It has been quite a while ago. He said it was on the order of shredded wheat biscuit, and he did not recommend it or anything, just said it was a new cereal. I serve it to five people at home, with milk and sugar, sometimes with warm milk. The youngsters like something like that in the evening before they go to bed. I keep it in the pantry in a package. I take it out, apportion it, and bring it to the table in a dish. Mr. Lane is the grocer, a service grocery, not a chain store. It is near my home.

MRS. ELEANOR FREY.

Deposition taken at Cincinnati, Ohio, March 22, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife with two children, and I use Kellogg's Whole Wheat Biscuit. I guess I have used it ever since it has been on the market. They put out samples. We liked it because it was toasted on both sides. We have continued to use it. I have used other biscuit of that same general type before; but we liked this better. It fits the cereal dish better, toasted on both sides; and is browner. We buy all Kellogg's products, like them, and use them all the time. For that reason, we bought Kellogg's Whole Wheat Biscuit.

We order it by phone. We ask for Kellogg's Whole Wheat Biscuit. My grocer does not substitute with me. When I ask for Kellogg's, I get it. The children seem to like Kellogg's biscuit very much. I appeared here today, because a man came to my door, a Kellogg man. I had not known him before he came to my door. He got my name from the grocer, because he knew I bought them.

CROSS-EXAMINATION.

THE WITNESS: Before I started using Kellogg's biscuit, I used shredded wheat, like Plaintiff's Exhibit 1, once in a while. I threw away the last I had, because they did not care so much for them after I bought Kellogg's, which they liked better. I have not used it for a long, long time. I did not buy them since I have been using Kellogg's biscuit. I used it years ago. I guess I have known it a great many years. I was through that plant twenty years ago, so I knew about shredded wheat. It was a familiar product to me under that name at least twenty years ago. Years ago when I ordered it, I asked for shredded wheat and got this package, like Plaintiff's Exhibit 1.

A sample of Kellogg's was left at my door, a small package. I liked it because it had the qualities I mentioned. I buy it at Lane's Grocery now, a small grocery store, not a chain store. I do not remember whether the sample said I could get it at the grocery. I just thought I could, because I knew he had other Kellogg products. I asked for it and got it. I had been a user of Kellogg's other products for some time. When they put out the biscuit, I started to use that instead of shredded wheat. Four people in my family use it. I serve it with cream and fruit, taking the biscuit out of the package and putting it on the table in a dish. We like it because it is smaller and one biscuit is just enough for one person. In my family, we do not care for the larger biscuit.

1604

MRS. VERA WALTER.

Deposition taken at Cincinnati, Ohio, March 22, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, with one child, and I use Kellogg's Whole Wheat Biscuit, having used it about five months. We like it. It first came to my attention by my grocer suggesting it to me. I went in and bought some breakfast food, Corn Flakes or Bran. He asked me if I had tried it. That is how I came to use it. I like to try everything new that comes out, and he likes us to try it. I liked the size, especially for the baby, and it is well toasted, all the way through, and has a nice color. I serve it in a small dessert dish with cream and sugar. The child likes it. Since buying it, I have continued to use it. . I order it sometimes on the telephone and sometimes at the store, as Kellogg's Wheat Biscuit. My grocer does not substitute to me. He gives us what we want. I have used another biscuit of the same general kind, larger, another shredded, wheat biscuit, the first one that came out, like Plaintiff's Exhibit 1. I used that at one time, quite a while ago. I am not a user of that biscuit. I tried it quite a while ago. The Kellogg man came to my door and asked me to come down here today. I did not know him before. I do not know how he got my name. I have dealt with Mr. Mueller, my grocer, about three years.

CROSS-EXAMINATION.

THE WITNESS: I never bought shredded wheat from Mr. Mueller; do not know whether he has it. I have not used it for three years, or in that time. I have known of it and been familiar with it, used it. It is a well-known product and has been for a long time. At present I am using Kellogg's Whole Wheat Biscuit instead of shredded wheat. My grocer asked me if I

would like to try the new product. I will try anything once. My family find they like it. The size is nice for the baby. They will not eat the great big one. I like the size of it. The other qualities, being toasted and brown colored, mean a lot to me, too, because it stays nice and crisp until the last bit of it is gone. Mr. Clarke asked me what I liked about it, but he did not suggest anything. This suggestion was entirely my own. There are three in my family and we all eat this biscuit. We take it from the package and put it on the table in a dish. My grocer is Mr. Mueller. He carries the whole Kellogg line. His store is on Jefferson Avenue, near me. It is a White Villa store, not a chain.

MRS. LILLIAN SAUR.

Deposition taken at Cincinnati, Ohio, March 22, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, with one child and a husband. I use Kellogg's Whole Wheat Biscuit, and have used it for about six months. I like it fine. The child seems to like it. I like it because one is just enough for my breakfast. Because of my weight, I do not take so much for breakfast. I like the way it is toasted. When I go to the store while they fill the order, I often see new products on the counters and ask about them. I get acquainted with them that way. I think that is the way I bought this. When I order it now, I generally go to the store and ask for Kellogg's Whole Wheat Biscuit.

I have used biscuit like Plaintiff's Exhibit 1, before I started using Kellogg's. I was a regular user of that, off and on. I like Kellogg's biscuit better, because of the size, small size, and it is appetizing because it is nice and brown on both sides. I use other Kel-

logg products, breakfast flakes, and bran. I use bran in baking, often. I came here today because some man whom I had not known before came to my door....

CROSS-EXAMINATION.

THE WITNESS: I suppose he got my name from my grocer, Mr. Mueller, whose customer I have been for fourteen years. I am his nextdoor neighbor. Mr. Mueller is well known in the grocery business, being president of the Retail Grocers Association. He has one of the White Villa stores and lives next door. I go in there as if I owned the store. I go around and help myself most of the time.

I have seen a box like Plaintiff's Exhibit 1 in Mr. Mueller's store. I bought it from him. I used it for many years before I bought Kellogg's. I have been to Niagara Falls and seen the plant, and I have known that as shredded wheat about as long as I can remember. I have not bought it for a good while. After I started buying Kellogg's biscuit, I did not go back to shredded wheat. I liked the size of the other better. I have not bought any since I first learned about the Kellogg biscuit, which I first saw at Mr. Mueller's store. I do not remember just how it was brought to my attention. I will often see something and ask about it. He told me the amount that was in it and the price. I do not recall his telling me it was like shredded wheat. I think they both sell at the same price. Just the two in my family use the biscuit. I prepare it with cream and sugar, sometimes a little fruit, bringing it on the table in a dish. The ladies sitting in the other room are just neighbors. I know just one of them.

MRS. MAUDE DEDRICH.

Deposition taken at Cincinnati, Ohio, March 22, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife with two children, and my husband. I use Kellogg's Whole Wheat Biscuit: I have used used it about two years and like it very much, the crispness, the smallness, and the fact it does not get soggy. I like all Kellogg's things. I first saw it on a table in Good's Grocery, took it without anyone saying anything, because it was Kellogg's. After I tried it, I liked it so much I used it instead of the Niagara shredded wheat, which I had never liked myself, but my husband had. He does not use the Niagara, because he likes this on account of the crispness. I arder it because I like the crisp, small biscuit. I did not get them and sent it back. I guess that is why Mr. Good sent me here. I sent back the big biscuit after I had ordered the small, crisp biscuit. I appeared here today, because Mr. Good said: "You are such an advocate of Kellogg's you had better go over, because you upset my store," because I sent back the big biscuit. 'His stenographer asked me to come over here today.

CROSS-EXAMINATION.

The Witness: I have been trading with my grocer, Mr. Good, quite a while. Before I picked up Kellogg's biscuit, I bought shredded wheat for my husband. I never liked it very much. My husband uses shredded wheat. I have known about it for many years. It is an old product about which I have known for a great while. I have used shredded wheat about nine years. Up to the time I discovered Kellogg's product, we had shredded wheat. I would not use it. Different times I would have different cereals. I would ask for shred-

ded wheat and get that. I do not get shredded wheat now. I ask for Whole Wheat Biscuit, and sometimes I get shredded wheat. I ask for the smaller biscuit. Once the clerks sent me shredded wheat, which I sent back and said it was not what I wanted. I think it was in Mr. Good's store I first saw the Kellogg product. It was on display somewhere on the counter. I saw it in a package with the window, like Plaintiff's Exhibit 1 and got that kind of package, but I do not remember what package I first saw. The first thing interested me was the fact it was a Kellogg product. I do not think I asked Mr. Good about it at the time. I think I just took it home to try it. After that, I ordered it again.

One of Mr. Good's girls in his office called me and asked me to come over. She said it was about Kellogg's, and "You know how you have ordered it and tried to get it and upset us with this Kellogg's." They asked me to come over about the biscuit and testify. Mr. Good himself was impartial. He gave me what I wanted, which he is there for. He has both in the store. Mr. Good is a neighbor, and I have known him for years. He operates a very good service store, not a chain store. I order by telephone or go down there.

MRS. LUELLA KUHR.

Deposition taken at Cincinnati, Ohio, March 22, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife and live with my parents. I am a widow with one child. Four of us in the whole household. We are users of Kellegg's Whole Wheat Biscuit. We have used it since within this year. We like it very much. There is a crispness about it I did not find in the others. I am partial to Kellogg's products. I like the size of the biscuit.

fitting better in the bowl. The girl likes it much better than the large one.

Once in my box of groceries there was a little pamphlet or slip. As soon as I saw the name, Kellogg's, I naturally wanted to try it. I have been using it ever since. Before that I used Shredded Wheat. I prefer Kellogg's biscuit. Our groceries are ordered over the telephone. I live out far, and go and call for them. I always say I want Kellogg's Whole Wheat Biscuit. He has it ready for me when I call.

CROSS-EXAMINATION.

THE WITNESS: I became acquainted with Kellogg's biscuit during the past year. I am not a recent convert. We used shredded wheat before that, except dad. He does not use many breakfast foods. I had known that shredded wheat before. It is an old product, well-known to me as shredded wheat before that time. Until I found this slip in my groceries, I had been using shredded wheat. It had been my custom to order it up to that time. I do not remember the nature of the pamphlet. I know it was something new in the Kellogg line. Until I had tried it I did not know particularly that it was something I could use instead of shredded wheat. As Kellogg put it out, I thought I would try it. I have used other Kellogg products and use them now: Kaffee Hag, Corn Flakes, Pep, and All-Bran. I thought I would try this one. I did and like it very much. I recognize it can be used instead of shredded wheat, and I have used it all the time instead of shredded wheat.

Henry Mueller, with the White Villa Grocery, is my grocer most of the time. He is quite well known in the grocery trade. I think he is president of the Retail Grocers Association. We deal mostly with him. We go to his store or telephone the order and pick I remember seeing Kellogg's Whole Wheat Biscuit piled up on his counters: His shredded wheat is up on shelves. I do not remember seeing it displayed. We serve Kellogg's biscuit by dipping it in a tiny bit of hot water, then pouring cream over it, bringing it to the table, in a dish. I used Shredded Wheat before I used Kellogg's biscuit.

RE-DIRECT EXAMINATION.

THE WITNESS: We dip it in hot water because my daughter does not like cold food on a cold morning. She does not like hot milk. I find Kellogg's Whole Wheat Biscuit does not sop up hot water quite as much as shredded wheat. It is a little harder, which is another reason why we like it very much.

MRS. AUGUSTA PAHREN.

Deposition taken at Cincinnati, Ohio, March 22, 1933.

DIRECT EXAMINATION.

The Witness: I am a housewife with one baby and a husband, no others in the family. I am a user of Kellogg's Whole Wheat Biscuit, having used it about three months. Mrs. Kuhr, the lady just in here before me, a friend of mine, recommended it to me about three months ago, when she was in my rooms. She asked me if I, ever used this biscuit, and I said no. She said, "I know you will like them if you ever do try them." The baby was really delighted with it. The size was better and they are browner. We just liked them better:

We had used one box of shredded wheat biscuit made at Niagara Falls, and I did not like them at all, they were so stringy and dry. My husband did not like them, they were so bulky and big. They never seemed to fit right in the dish. We did not care for them at all. We never had any of those biscuit for so long, until she came with Kellogg's, and I liked it. In fact, we liked all the other Kellogg products. I use them. I like All-Bran, and my husband likes Corn Flakes, always eats them. The baby and I eat biscuit and like them. We ask for Whole Wheat Biscuit. I insist on it, although I never had anyone give me anything else.

CROSS-EXAMINATION.

THE WITNESS: We also have had shredded wheat. We got samples of it, which I did not care much about. I tried a box and simply had to throw it out because we did not like it. It was so dry. That has been two or three years ago. I knew about shredded wheat long before that; had heard about it, but I was never really interested and had not been a user of it, had not tried anything of that kind to any extent.

I did not know about the small Kellogg biscuit until Mrs. Kuhr told me about it two or three months ago. She told me we would like it and said they liked it because it is so small and crisp. At that time, the baby was eating cooked cereals. She was never used to this dry food, because it is natural for a baby to have cooked foods at first. She got to the age where we could change to that. Mrs. Kuhr said it was better than shredded wheat. She compared it to shredded wheat biscuit. I buy from Mr. Mueller. Mrs. Kuhr lives right alongside me. She goes there two or three times a week, comes over and asks me what I need and gets my groceries for me. It is more than five miles from my house. Mr. Mueller is a good business man and has a reputation all over the city. He is the sort of man you can put faith in. If you ask him for something, you will get just what you ask for. We go

there once in a while, but not often. I never looked for and do not remember seeing in his store shredded wheat like Plaintiff's Exhibit 1. I was not interested in it. Whole Wheat Biscuit is all I am looking for. I serve it with milk, usually heating it first to make it taste better, and bringing it on the table in a dish.

I was never interested in shredded wheat, to be truthful. I did not try eating it that way. I warmed it in the oven, and it tasted like straw to me. I never had that criticism of Kellogg's biscuit. It does not taste like haled hay. I really like it.

MRS. SARAH OWENS.

Deposition taken at Cincinnati, Ohio, March 22, 1933.

DIRECT EXAMINATION.

The Witness: I am a housewife with two children and a husband, no others in the family. I look after them and also keep a beauty shop. I am a user and consumer of Kellogg's Whole Wheat Biscuit. I suppose I have used it three or four months. I do not go to the grocery. It is handled by telephone. When he sent me the order, Mr. Mueller had a pamphlet in there that they were something new. I tried it the next morning when I called the order. I use Kellogg's Corn Flakes. I thought I would try that for a change. It was a Kellogg product, I saw. I like the Kellogg biscuit and have continued to use it. My child and husband both like it very much.

When I was at home, before I married, mother had the other biscuit, Shredded Wheat, like Plaintiff's Exhibit 1. I did not use it much at home. I thought it was too big; so I just used corn flakes. I have not used shredded wheat at all since I married. Since I was introduced to Kellogg's, I have continued to use

it and liked it very much. When I order it, I ask the grocer for Kellogg's Whole Wheat Biscuit.

CROSS-EXAMINATION.

THE WITNESS: I have known about shredded wheat. We always had it at home. It is a very old and well-known product, but I never used it myself. Mother always had it. It was served at my home for many years, to my knowledge. I am a customer of Mr. Mueller, whose store is a square and a half from me. He calls me and I give him my order every

morning.

Three or four months ago, the pamphlet he sent me said it was new Whole Wheat Biscuit and smaller in size than shredded wheat. That is what I liked about it. There was a picture of a dish with two biscuit in it. I recognized I could use that instead of shredded wheat. I noticed it was practically the same, until I got the box. Then I saw there was a difference, that they were browner and smaller. We serve it at home with milk and sugar, taking it out of the package and breaking it up in a dish and bring it on the table that way.

Mr. Mueller told me you were having testimony and asked me if I liked one or the other. I said I liked Kellogg's. He asked me to come up and testify for Kellogg's. I said I would. He said nothing about shredded wheat. He just said the two companies were having a controversy. He did not tell me what it was

all about.

RE-DIRECT EXAMINATION.

THE WITNESS: Women usually resent substitution very much. They do not like it. Rather than try it, they will send it back. They think, "Oh, very well, it must not be very good if they are trying to push it on you." It interested me when they sent the cir-

cular. Mr. Mueller is very good that way. Anything new he usually has lying on the counter and printed circulars near it. If you do not come in, he sends the circular with the order. He did that when I opened my beauty shop. He sent all those circulars around with the orders.

RE-CROSS-EXAMINATION.

The Wirkers: I know how people are about substitution. I handle women every day. If they come in and ask for a Eugene Permanent and I try to substitute something else, they say, "Just why do you want to do that?" If you are out of it and tell them it is just as good, they may try it. Nine times out of ten they will say: "I liked my wave last year better." They like sometimes to try new things; but they do not like new things to be pushed on them. I introduce them by suggesting them. If Mr. Mueller sent me Kellogg's Whole Wheat when I wanted shredded wheat, I would think he was trying to put something over on me, because I would want the other.

RE-DIRECT EXAMINATION.

THE WITNESS: I would have the same feeling if I asked him for Kellogg's and he sent me shredded wheat. I prefer Kellogg's.

RE-CROSS-EXAMINATION.

THE WITNESS: I was on the stand, went out, was talking to the ladies, and just happened to make the remark that ladies do not like things pushed on them. Then I was asked to come back.

RE-DIRECT EXAMINATION.

THE WITNESS: Mr. Clarke did not suggest it to me. He was talking about an entirely different subject.

NAT C. REIS.

Deposition taken at Cincinnati, Ohio, March 22, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer, doing business under the name of George Bilker, my son-in-law. I have been in the grocery business about fifteen years. We are all managers. We handle Kellogg's Whole Wheat Biscuit and have done so about two years. We had calls for it from consumers and that led to our getting it. We have continued to handle it. The demand for it has increased.

We also handle Niagara shredded wheat. We sell more shredded wheat than Kellogg's shredded wheat, in a proportion of about sixty-forty. Kellogg's is growing in demand the fastest. We have given dealer co-operation to the Kellogg Company in creating demand for their biscuit. We have advertised it on our direct failing list and have given it window and store displays. We have explained to customers it is a new product. We always do that with any new product. Customers like to be told about new products. The Niagara they just call plain shredded wheat. They call the Kellogg product Whole Wheat Biscuit.

We have no confusion in this store between those two products. They call for them by brand name. Kellogg's Whole Wheat Biscuit is shredded whole wheat—that is, a shredded wheat biscuit, smaller than the other, with more in a package. I know of no way to describe it, other than to call it shredded whole wheat biscuit. I do not believe you could call it anything else. You could not mix up the dress of the packages. The Kellogg biscuit is in the same dress as the rest of the Kellogg line. There could be no confusion between

that and the Niagara package at all. We do not substitute.

We handle quite a bit but not all the National Biscuit cracker line. The Niagara item has been cut in price by the chains sometimes below our cost. That naturally interferes with our profit on that product. We sell Kellogg's biscuit for ten cents, and get eleven cents for shredded wheat. That is the chain-store price for shredded wheat. When it is cut, it is cut as low as nine cents.

The Kellogg Company co-operates with us in creating a consumer demand for its Whole Wheat Biscuit, giving us cut packages to open up and show customers what it looks like, also display material. They have not yet taken any lists for mailing coupons and things like that to customers. They have spoken of intending to. Customers experiment. When there is a new product on the market, they will be glad to try it.

CROSS-EXAMINATION.

THE WITNESS: I have been in the grocery business just about fifteen years, during which time I have been familiar with the old shredded wheat, made at Niagara Falls. It is a product we have always carried, a verywell-known item. I presume it was well-known at the time I went into the grocery business. My customers have always asked for shredded wheat. I never knew it by any other name. It has always had very much that same general appearance, the biscuit itself. They have changed the package, I believe. I display shredded wheat in the store along with the other merchandise. It is with the cereal right there, now. Shredded wheat still outsells Kellogg's product at present. I called the Kellogg biscuit shredded wheat, because the customers ask for it that way: Kellogg's shredded wheat. Sometimes they ask for whole wheat. When Mr. Clarke asked me what L would call that biscuit: I

said it was a shredded wheat biscuit. That was the only name I could think of to call it by. It is a process, more or less, that they have described. I have known this one biscuit, known as shredded wheat, continuously for many years. I first find out what the new product is, how it is made, and we call it by that name. It looks like the other biscuit and is like it. Because of that, I call it shredded wheat.

Shredded wheat, as now sold by the National Biscuit Company, known to me since I have been in business, up until the Kellogg product has been on the market, has about held its own in sales. It goes up and down. Kellogg's shredded wheat has not supplanted the National Biscuit shredded wheat in my store. There might be some customers who used to get shredded wheat and now buy Kellogg's Whole Wheat Biscuit. That could be possible. I would not say we put more sales effort behind Kellogg's biscuit than behind shredded wheat. We have had store demonstrations of both products. We are interested in selling more of every item in the sto ... We do not care who makes it. We make a little more profit on Kellogg's Whole Wheat Biscuit than on shredded wheat. There is a little better margin of profit for us.

When I said chain stores cut shredded wheat below cost I meant below my cost. I do not know whether it is below their cost. My store is not a member of any chain or voluntary chain. We are an entirely independent organization. We get Kellogg's biscuit through the jobber. We are not in a buying organization or association of any kind. National sells us shredded wheat direct. Their salesman services this store every week.

RE-DIRECT EXAMINATION.

THE WITNESS: Ours is a semi-service and semi-self-service store. We sell for cash and do delivering.

We have goods stacked on the floor so customers can help themselves and pay for them at the counter. We have a telephone business also. We have four 'phones, and five trucks for delivering.

RE-CROSS-EXAMINATION.

The Witness: When our customers telephone, they ask for shredded wheat or for Kellogg's shredded wheat: We furnish what they ask for. If we are out of one, we do not send the other. We always call them up, say we are out of the item, and explain the nearest item we have. If a customer asked us for shredded wheat and we were out, we would tell them we have Kellogg's Whole Wheat Biscuit. We explain the nature of the biscuit and ask her if she would like to try that. If she would, we send it up.

RE-DIRECT EXAMINATION.

THE WITNESS: We do not regard that as substitution but as service to the customer. If she is out of something, we do not want her to stay out of it. She might need it.

WILLIAM M. STEPHENS.

Deposition taken at Cincinnati, Ohio, March 22, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a grocery manager, connected with Kroger's, as store manager. I have been manager for Kroger's for nearly nine years. Before that, I was in business for myself as a grocer for nearly three years.

I handle Kellogg's Whole Wheat Biscuit. It is just shredded whole wheat. I do not know any other way to describe it. We have had it a long time, I imagine since it has been put out. There is a great consumer demand for Kellogg's Whole Wheat Biscuit.

We handle Niagara shredded wheat. Of the two, Kellogg's Whole Wheat Biscuit sells the most in our store, about three to one. I co-operate with the Kellogg Company in advertising or bringing Kellogg's Whole Wheat Biscuit to the attention of consumers. We have it on display at all times. They have given me demonstrations which I asked for. I think I advertised it once. The Kellogg Company has sent out cards.

We never had any confusion in our store between the two products. We handle the rest of the Kellogg' line. We sell both products at the same price, but we make a larger profit on Kellogg's. We handle the rest of the National Biscuit line and get a discount on it, including shredded wheat. We are never allowed any advertising a towance by the Kellogg Company. There is shifting around by consumers from brand to brand or from product to product in the cereal line. Our store is partly service and partly self-service. I have sometimes as high as fifteen clerks on Saturday, quite a large store. I get a very few telephone orders. If I got a telephone order for Kellogg's shredded wheat, in order to save confusion or anything like that, we always ask a customer if they want shredded wheat or Whole Wheat Biscuit, because they might get mixed up. To avoid mistakes, we would naturally try to find out.

Of the two products, Kellogg's is growing fastest in consumer demand in our store. It has a very rapid increase. I buy that product direct from the Kellogg Company.

CROSS-EXAMINATION.

THE WITNESS: The store we are now in is in the basement of the Sears-Roebuck Building. The Kroger

Company operates the store in connection with the Sears-Roebuck stores, as Kroger Stores. They have three hundred and some in Cincinnati. Last summer, we had three hundred and eighty-seven in the Cincinnati branch. I am manager of this store, one of the three hundred and more.

I have known and carried in stock shredded wheat for a good many years, for a number of years before Kellogg biscuit was put on the market. People asked for it as shredded wheat at that time. Prior to the coming of Kellogg's biscuit, there was no doubt in my mind what they wanted when they asked for shredded wheat. Very few ask for shredded wheat. If they do. I get them shredded wheat. A majority of them will say: Give me Kellogg's. Most of them say: "Give me Kellogg's shredded wheat" and some say: "Give me Kellogg's Whole Wheat Biscuit." On telephone calls, I ask, when the customer says: "Send me a package of shredded wheat," since the Kellogg product has been on the market, there has been some doubt in my mind as to whether they wanted Kellogg's or the shredded wheat we carried formerly. Most customers who come in the store usually point out which one they want. We will get maybe not three or four telephones a week. We would naturally ask them which one they wanted. There is a slight possibility, we might, on the telephone call, send them the wrong product and get it back. We have not had any confusion. I have my first time yet to have any confusion. To that extent, I have avoided it by making sure. I did not tell you I did do that. I said we would. If such a thing should happen, that is what I would do. I am not telling you what did happen.

Within the last two or three years we have been handling Kellogg's Whole Wheat Biscuit. I have not displayed it until I got the neon sign. I have a number

of Kellogg products on the table surrounding the neon sign, among them Whole Wheat Biscuit. We have a supply of Whole Wheat Biscuit on the shelf back of the counter here, marked ten cents. I have shredded wheat here, too, on the shelf there, with a ten-cent sign on it. The sign has got knocked down and is not on it at the moment. There are three packages of shredded wheat on the counter, over back against the wall; so that, standing as we are standing now, you cannot see shredded wheat at all. That is all the stock of shredded wheat we have at the present time. We get it direct from the salesman. We give him the order. I believe he came in today. That ought to run us, three packages, until next week.

I do not know whether nine or ten packages of Kellogg's will run us until next week, also. It might or might not. I said three to one of shredded wheat. The Whole Wheat Biscuit may outsell it more than that. I think it safe to say right now it will run five to one; but, ordinarily, three to one. I guess that ingrease in Kellogg's at the expense of shredded wheat has taken place within the last couple of years. To a large extent Whole Wheat Biscuit has forged ahead of shredded wheat in our store. I know customers who used to use shredded wheat and now use Kellogg's. We do not get people's names; but a customer said to me the other day, after calling for a package of Whole Wheat Biscuit, she made the remark without my saying anything to her, that the reason she liked it better than the other was there are more biscuit to the package, smaller, and the kids did not waste. so much. It was evident, from what she said, that she had been a user of shredded wheat and had switched to Kellogg's biscuit, during the period it has been on the market.

RE-DIRECT EXAMINATION.

THE WITNESS: If I had an order for just shredded wheat, I would give the customer shredded wheat. If

90

I sent out the Niagara Falls ahredded wheat, it is entirely possible that a customer would send it back and say what she wanted was Kellogg's shredded wheat.

RECHOSS-EXAMINATION.

The Wirkes: When a customer asks for shredded wheat, I do not endeavor to sell her the Kellogg product. Substitutions do not build me. I have not at any time tried any pushing with customers for this Kellogg product. It seems to be advertising itself around here very well. Our people come here and pick it up. We have some packages of the Kellogg product with the cellophane window. People come in and see that and pick it up. That advertises it.

RE-DIRECT EXAMINATION.

THE WITNESS: We do not mix up the Kellogg package with the Niagara package.

SAM J. FRIEDMAN.

Deposition taken at Cincinnati, Ohio, March 22, 1933.

DIRECT EXAMINATION.

THE WITNESS: I have a restaurant of my own on Burnett Avenue, 3431 Barnett and 3421 Lambert. We seat about five hundred people and serve from three to four hundred on Sunday. I have from fourteen to sixteen helpers at times, in shifts. It is not a cafeteria, all table service.

We haddle Kellogg's Whole Wheat Biscuit in the restaurant size. That is the only kind I carry. I have carried it six or seven months. I did carry the Niagara shredded wheat biscuit, every bit of six or seven months ago.

Kellogg's biscuit is served in the box. My girl hands out the box on the plate, and the customer dumps the biscuit. Sometimes the girl gives them service, assists them. At times we get calls for shredded wheat. The girls know we do not have it. They tell them we have gotten Kellogg's Whole Wheat Biscuit. Around the time of their advertising campaign, we got quite a lot of calls for Kellogg's Whole Wheat Biscuit. We had it, because we got it right at the time they had that campaign on. My customers accept it right along. I never had one complaint about it.

I prefer to serve my trade with dry cereals in the individual cartons. It makes everything uniform. Where others are serving, one might give more and another less. With the biscuit, of course, we know just how much to serve. I buy them from the Kellogg Company individually, so many of each kind to a carton, or so many small individual servings in a carton, including Whole Wheat Biscuit and the other products.

CBOSS-EXAMINATION.

THE WITKES: I have had this restaurant two years. I was never in any business at all before that. My entire experience with this product has been confined to two years. Before I carried Whole Wheat Biscuit, I had shredded wheat in large packages. I presumed I could get them in individuals, but I never inquired. I have a certain amount of calls for each kind of cereal. We have a busy breakfast business. Before the Kellogg biscuit, I served the shredded wheat out of the large carton in a dish. The Kellogg representative came around at the opportune moment when I was in need of some and he had this assortment to put up to me. I had used the other Kellogg products, always had them in the individual cartons, Pep, Corn Flakes, Rice Krispies, and all those things.

before the salesman called on me and showed me an asserted case of those things I had been using, including Whole Wheat Biscuit and these other Kellogg products. Then I did not buy any more shredded wheat.

My customers sometimes ask for shredded wheat, and I tell them we do not have it. We offer them Whole Wheat Biscuit. If they want to try it, they can. Sometimes they take it, and sometimes they say, "Give me something else." Sometimes a customer who asked for shredded wheat will take Whole Wheat biscuit, after the clerks have explained it to them.

Around that time, I noticed they advertised over the radio, and then I began to notice there was some call for it. I have never seen a salesman for shredded wheat. I run over to the grocery and buy one of those large boxes. I got my shredded wheat from the dealer and handed it to my customers that way. I was a greenhorn at the time: I came here today, because a Kellogg man asked me how I served the stuff and so forth, and I told him. He wanted to know if I would testify.

RB-DIRECT EXAMINATION.

THE WITNESS: If a customer asked me what Whole Wheat Biscuit is, it looks like a little straw pillow. That is the easiest way to explain it to anybody. That is what I would tell anybody, because, if you can explain exactly, that is best. I think that comes pretty close to it. That is what it looks like. If I were asked what Ningara shredded wheat was like, I would say it is a larger biscuit, a larger straw pillow. That is the easiest way to describe it to a person.

ALONZO M. KING.

Deposition taken at Cincinnati, Ohio, March 22, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a restaurant man, cock and baker, and own my own restaurant, the Kingfish Restaurant. I have operated it since November. It was a going business when I took it over. It was stocked with Kellogg's different cereal products and nothing else that I remember. Kellogg's man was calling. There were Whole Wheat Biscuits there, and I have continued to carry them and order them through Kellogg's salesman, who comes around regularly once a week. Last Wednesday, for the first time, I had a man call about Niagara Falls shredded wheat. The National Biscuit man makes his regular call and I buy crackers and whole wheat flour from him. I have never handled any Niagara shredded wheat biscuit in this restaurant. I have continued to carry the Kellogg biscuit in individual cartons. They are displayed stacked in individual cartons on our back bar. They are served from the carton, more sanitary, and the customer knows they are new, not left from someone. else. This is more vermin-proof.

I have been seventeen years in business. If served individually to the customer in the carton, he knows it has not come from a roach-infested opened package and does not contain a biscuit left by someone else. He opens it and takes the biscuit out himself.

As a rule, I buy the Kellogg assortment of individual packages. Being displayed there, Whole Wheat Bischits, a man will ask for what he sees more often than what he remembers. They will more often call for something already displayed. I have had them call several times for shredded wheat, and I say I have

the Whole Wheat. I have had no objections in my place to serving Whole Wheat Biscuit in lieu of the other. All my cereals are from Kellogg's. That might not have been if they had not been stocked when I went there.

CROSS-EXAMINATION.

THE WITNESS: I have only been here since November. I bought the restaurant then right from the buyer. It is a lunch room, where we serve regular meals, lunches, and sandwiches, also a general line of bakery products. It has a counter and tables, not a cafeteria but table service. I have waitresses and myself, five of us in all working there. We are at 306 Sycamore Street, in the down-town section. I do not have a fancy trade, but quite a bit of wholesale house trade and printers, a large number of them, lunches, orders going out, and so on. I do not think you would consider cereals an important part of our business. We have some demand, not so very important.

When I came there, it was stocked with Kellogg products, and the Kellogy salesman had his regular call. I buy a case assortment from him at a time, including Whole, Wheat Biscuit. I suppose there are a hundred and forty in the case assorted, maybe a dozen or more Whole Wheat Biscuit. We stack them on the back bar, where our customers can see them. We do have calls for shredded wheat. The restaurant man usually substitutes whatever he has, in case he has not what they asked for. We try to substitute: but we have made it a point to explain we do not have it and are giving him something in place of it, because a customer does not like to have something put over on him. I would leave it to him to say it is just as good. I never had a customer who asked for shredded wheat refuse to take Whole Wheat Biscuit.

The customers who come in and ask for shredded wheat possibly did not know there was a Kellogg's on the market. It has not been so long that I knew it. I have used shredded wheat a good many years. I have been in business seventeen years and knew shredded all that time. It was one of the first things I saw on the display counter, I guess. In most of the restaurants I have worked, we have had shredded wheat; and it has been very usual in my experience for customers to ask for shredded wheat. When they did, I knew what they expected to get. There was no question about it.

The Kellogg salesman asked me if I could come here today. I said I would. I did not know what it was all about. I had so much business today, I really did not have time; but, for the interest of all, if I have done any good either way or enlightened you, I am glad. I deal with one as much as the other.

RE-DIRECT EXAMINATION.

THE WITNESS: I still do not have a very good idea of what the case is all about. I have no prejudice either way, because I buy more baking material than I do Kellogg's. I do not buy any cereals from the National Biscuit Company. I ordered a case of Wheatsworth flour today. The cereal end of my business cannot be so important. Of all cereals I sell, neither Whole Wheat Biscuit nor Corn Flakes is anything like as good a seller as Bran Flakes or Pep, the big sellers. Compared with those, Shredded Whole Wheat Biscuit or Whole Wheat Biscuit is a small seller. That is also 'true of Kellogg's Whole Wheat Biscuit. Corn Flakes usually lead but not now. Bran Flakes and Pep are in the lead. I have to order a whole case of Pep now. I have worked in other restaurants where individuals have been used in selling cereals, individuals of the Niagara product.

JOHN J. EHRMAN.

Deposition taken at Cincinnati, Ohio, March 22, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am owner of a restaurant, Ehrman's luncheonette, 241 East Fourth Street, Cincinnati. I handle Kellogg's Whole Wheat Biscuit there, in individual cartons. We have carried that product about a year and a half. It is shown up on the back board of the fountain. We have customers ask for it by name. When called for, we serve it by cutting a carton on the sandwich block, in view of the customer, at the soda fountain. We dump it out of the carton into the plate, not touching the product with the hands. I have never handled cereals except in individual cartons. If a customer asked for shredded wheat, we would have to show him up there it is Whole Wheat Biscuit. We have never had customers refuse to take it.

CBOSS-EXAMINATION.

The Witness: I do not know much about shredded wheat. I have heard of it. I have never handled it and do not handle it at my lunch counter and soda fountain. I have been there close to two years. I never was in the restaurant or lunch-counter business before; my first experience. I have never handled shredded wheat; but, when a customer asks for shredded wheat, I point out the Kellogg biscuit and he accepts that instead. I am located on the corner of Sycamore Street.

I buy my Kellogg cereals in the original assorted case of individuals, a hundred or so. I do not have a large or very important cereal business. I bought this restaurant. It went into bankruptcy and did not have any stock.

RE-DIRECT EXAMINATION.

THE WITNESS: The Kellogg man calls on me about once a week. Among the dry cereals, I think I sell most of All-Bran, Bran Flakes, and Corn Flakes. They all sell more than Whole Wheat Biscuit.

JENNINGS ATKINS.

Deposition taken at Cincilnati, Ohio, March 22, 1933.

DIRECT EXAMINATION.

THE WITNESS: I own my own restaurant and have been in it since July. I was not in the restaurant business before. It is the Bismarck Eat Shop, 5 East Court Street.

I carry Kellogg's Whole Wheat Biscuit in that restaurant. I have carried it ever since I have been in business. I also carry Niagara shredded wheat, a larger biscuit; both in the individual carton. I do not know which one is the larger biscuit. I have never examined that particularly. I do not know whether Kellogg's is bigger or smaller. Kellogg's Whole Wheat Biscuit is the far superior seller of the two products, in my place. It outsells Niagara shredded wheat two to one. My customers ask for it by name, as Kellogg's Whole Wheat Biscuit. If he wants shredded wheat, we give him shredded wheat, because, while times are hard, yet there is no use putting great sales effort into substituting anything else.

I buy my Kellogg products from the Kellogg salesman. He comes around regularly to visit me, every week or so. I have not, to my knowledge, had any calls from National Biscuit about shredded wheat. The biggest seller in my restaurant would be Kellogg's Corn Flakes, a much larger seller than Whole Wheat Biscuit. I have been in other restaurants, and I have not seen any restaurants that sell cereals except in individual cartons.

CROSS-EXAMINATION.

THE WITHES: Court Street is a down-town street in Circinnati. The seating capacity of my restaurant is fifty-two. I have two counters and eight tables. My principal business is at noon; but we have a good breakfast and night trade. The cereal end of my business is important. When I first got the restaurant I found it stocked with both shredded wheat and Kellogg's. The stock of shredded wheat has lasted me until now. I still have it on hand. I have a supply of Kellogg's Whole Wheat Biscuit also on hand. I display them both. They are right, under the counter. I do not have customers who have shredded wheat. I do not sell it. Not exaggerating, I have not sold four packages since I had it. For Kellogg's I have a display of four little posters with the little package on top. I have no cards for shredded wheat, but I have them stacked up where they can see the package.

I have not received calls, to my knowledge, from salesmen for the National Biscuit Company. I carry no National Biscuit products, crackers or other cereals. A Kellogg salesman came in and asked me to come down today and tell you what I know about which is the best seller.

RE-DIRECT EXAMINATION.

THE WITNESS: The Kellogg product outsells the other two to one. I have bought at different times from Kellogg's, but I would imagine that is the percentage. I told Mr. Vilas I had sold four packages. I have sold more than eight of the Kellogg's.

RR-CROSS-EXAMINATION.

THE WITNESS: I buy a case of assorted Kellogg's coreals.

DEPOSITIONS TAKEN AT PITTSBURGH, PA., MARCH 23, 1933.

Mr. CLARKE: This morning, in the cafeteria of the William Penn Hotel, on the long counter, was a display, including a number of cereals, each in an individual carton, and each carton being in a plate of its own.

The last two cereals on the counter were a package of shredded wheat and a package of Kellogg's Whole Wheat Biscuit. There were only two of these packages on the cereal counter, and they were side by side, each package being in a plate.

I make this statement through the courtesy of Mr. Vilas, and I offer in evidence the Kellogg package as a defendant's exhibit.

(The Kellogg package referred to was rereceived in evidence and was marked "Defendant's Exhibit No. 80.")

MR. CLARKE: And I also offer the shredded wheat package in evidence.

(The shredded wheat package referred to was received in evidence and was marked "Defendant's Exhibit 81.")

Mr. VILAS: Mr. Clarke's statement is accepted as a statement of fact.

MB. CLARKE: Thank you, Mr. Vilas.

GEORGE E. ANDER.

Deposition taken at Pittsburgh, Pennsylvania, March 23, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am district manager for the Kellogg Company and have been connected with them

about seventeen years. I was salesman in Illinois for several years, district manager at Omaha for seven years, and here the balance of the time, about three and a half years. My title is district sales manager, and I am in charge of Pittsburgh territory, including part of Ohio, half of West Virginia, the western half of Pennsylvana.

The product known as Kellogg's Whole Wheat Biscuit has been introduced into our territory. I have secured distribution on it in the better grade of stores in my district; I would say about eighty per cent. in the whole territory, of the A and B stores. Not so much in Pittsburgh. It would not be so great if we classed all stores, because many small stores do not handle cereals. A consumer demand has been created for the product in my territory.

To introduce Kellogg's Whole Wheat Biscuit to the consuming public and create a consumer demand for it, we have done a very extensive job, especially in surrounding territory, not so much in Pittsburgh. We have done house-to-house work in a great many towns, including Erie, Cumberland, Parkersburg and some of the larger towns, selling one package and giving one free. We have done a great deal of work on tie-ups. Defendant's Exhibit 82 is last Friday's ad at Martin's Ferry, forty-inch, advertising two packages of Whole Wheat Biscuit and a geography chart free, with a tie-up in every town. Those all refer to Kellogg's Whole Wheat Biscuit, using the tie-up.

We have held Saturday demonstrations, conducting them in hundreds of stores, featuring Kellogg's Whole Wheat Biscuit. We have also had tie-ups using Jungle Land Books and Books of Games. Last year we featured Whole Wheat Biscuit quite extensively, two packages and a book of games for children. This type of work was featured by a great many voluntary chains in their advertising, and we had a tie-up with

them at the time we worked the towns, using the fortyinch tie-up ad, so we would have a general coverage of advertising, also assuring us distribution in these voluntary groups even in the stores outside the towns we were working in.

We would follow up, in all those towns, with an advertising campaign three or four weeks later, putting up window displays similar to that a photograph of which is Defendant's Exhibit 83, and smaller displays like that, a photograph of which is Defendant's Exhibit 84.

We have made a practice of setting up floor displays in practically all stores as the salesmen called on the trade. That is a very effective way of calling the product to the attention of consumers.

Then we had the coupon proposition, securing the names of some retail customers, and mailing them this coupon, suggesting they purchase this package of Whole Wheat Biscuit and secure a free package. Those methods have had very good results in creating a consumer demand for Whole Wheat Biscuit, especially on the coupon.

In selling the biscuit here, we bring out the point we have a biscuit toasted on two sides, smaller-sized, one that will fit the bowl, and fifteen biscuit to the package. We follow that up with extensive work on the consumer. When we sell the retailer, we mention it is not merely putting a package on the retailer's shelf but the work on the consumer. We have tried to sell the product as Kellogg's Whole Wheat Biscuit.

We have worked the restaurant trade with a combination case we have sold quite a number of, getting introductory business, containing a few packages each of all our products. We also put up a number of displays in the restaurants, a small counter display, into which the individual-sized package fits. We always try to sell all our products in individual-size cartons to the

restaurant trade. It is more appetizing to the consumer. They will sell more. Checking up on individual packages, we find they do sell more. There is always a certain amount of waste in the large package, so it is advantageous to the restaurant man to carry the individual size. I think that policy has increased their sale lately. Quite a number of years back, we had quite a battle encouraging the individual size, but they are pretty generally accepted now by restaurant men. It is a general policy to use individuals in restaurants.

It is advantageous to the manufacturer to have the product delivered to the consumer in a carton carrying his name. They know the products they are getting, and the merchandise is usually fresher. There is no difference in a physical sense between the individual and sample package. They are both the same length, one labeled sample and the other individual.

To that degree, every individual package bought acts the same as a sample. If the sample has any value at all, and they try it out and like it, the individuals in a restaurant should have the same effect of inducing the customer to buy the large package for use at home. The Kellogg Company has no policy to dis-

courage the sale of the individual package.

We very seldom meet the salesmen of the National Biscuit Company in the trade, as far as shredded wheat and Kellogg's biscuit are concerned. We push the other Kellogg products. We do not encounter a National Biscuit man in any way while pushing our Corn Flakes. We come up against specialty men of the same type as ours in connection with other products, but not National men. The strongest competition we have is on Corn Flakes. I have not found that the National Biscuit salesmen put anything like the push behind the sale of shredded wheat that we put behind our Whole Wheat Biscuit.

Practically all the jobbers handle Kellogg's Whole Wheat Biscuit. The majority of them push the biscuit. They do not push the Niagara shredded wheat to the same extent, because a feeling seems to exist among the jobbers that they are dissatisfied with the National's policy in the first place, selling various retailers direct, placing them under a handicap; therefore, they are anxious to push our biscuit. The Kellogg Company gets full wholesale service through its wholesalers, which is not true with regard to the National Biscuit Company.

We get very good co-operation from dealers in pushing Kellogg's Whole Wheat Biscuit. The independent retailers have given us splendid support. A great many of them bring out the point they are dissatisfied with the various National Biscuit discounts and so they are anxious to push our biscuit, so the prices will vary. They give us window and store displays and dealer newspaper tie-ups. It is known in the trade as Kellogg's Whole Wheat Biscuit. The Kellogg Company makes no allowances for advertising.

CBOSS-EXAMINATION.

THE WITNESS: They do not make any, as far as I know. I am very confident they do not. I did not mean to be understood as saying that Whole Wheat Biscuit is not competing with shredded wheat. It would be competitive in a sense, but I would think, if Shredded Wheat did the work we do on our biscuit, it would not detract from Shredded Wheat biscuit. I do not think Kellogg's Whole Wheat Biscuit is supplanting it anywhere. I think we are creating an entirely new field for ourselves.

I think that is entirely consistent with my testimony that jobbers give no assistance to the National shredded wheat but do to us, and that retailers are all

willing to give us space, from this standpoint. National sells on a direct basis, by a different method of merchandising than Kellogg's, not needing the jobber, selling direct to the retailer. You have gone direct to the retail trade. Ultimately, the product reaches some consumer. It reaches some outlet. I may look at this differently. I figure it this way: On Corn Flakes, for example, if we had been alone in the field. they would not be the leading seller today that they are, I believe. By virtue of efforts of manufacturers attempting to interest the consumer, a big demand for corn products has been created. Years ago, wheat products were big sellers, and corn was not. I surely do not mean to say we are not in competition with other brands of corn flakes. In selling a different brand of shredded wheat, we are indirectly but not directly in competition with the other.

I did not hear the ladies testify. If they said they used shredded wheat until Kellogg's Whole Wheat Biscuit supplanted it on the market, there was a preference there. It would compete with shredded wheat; but I say, if they had done the same work we did, they would have created a better market for their product.

I know shredded wheat has for years done work, including newspaper advertising and so forth, to create consumer demand, and that shredded wheat is advertising today in the newspapers, in some instances on the same page with Kellogg's ad. Advertising products alone is out of the question. I agree with you that these two items are in competition with each other; and that, through our efforts, Kellogg's Whole Wheat Biscuit, in some instances, does supplant and take the place of shredded wheat.

When I told Mr. Clarke one of our selling points is that it is a smaller biscuit, I meant it was smaller than Shredded Wheat Biscuit. In making these talk-

ing points, I have compared it with shredded wheat. It is obviously a competing article.

When I said eighty per cent, distribution among retailers. I meant to include the entire district, in the grades A and B stores, the better stores, where the volume is. I do not refer to small holes-in-the-wall, inst the better class of chain and service stores. I did not mean to be understood as saying the percentage applied in Pittsburgh. We have no such complete distribution as that in Pittsburgh. There was a survey made by one of the newspapers here, in which they found shredded wheat was the largest selling whole wheat cereal. I am familiar with that survey, made by the Pittsburgh Press, in which they found, based on two hundred interviews, that shredded wheat stood eighty-four-and-a-half per cent. among wheat cereals, and Kellogg's Whole Wheat twenty-four-and-an-eighth per cent. That was about five weeks ago. That survey was taken among two hundred independent retail stores and jobbers. Since then, A. & P. have stocked our Whole Wheat Biscuit, which would bring up the percentage somewhat.

Cumberland, Maryland, is in my district. Mr. Tomsko from there said there was a house-to-house campaign there and twenty-eight cases went through his store in one week. I am not familiar with it. I know our salesman who was working the town reported the man had done an unusual job on a Saturday sale. He had no special deal on at that time. No part of the twenty-eight cases was free goods, that I am aware of. My recollection of that is that we had just completed sampling that week, had spent about a week and a half on the house-to-house work, and this store featured the biscuit on Saturday in their advertising. I am not sure, but I think he had no sale of any kind. We never let a store operate a sale themselves. Our salesman is in the store and sells the merchandise him-

self. We were sampling the full-sized package, selling one and giving one. We bought some of them from his store and some from every store in Cumberland. I do not think that was part of his outgo that week, not for that Saturday. He said it was in the week. I do not think we would have over three cases we would pick up from this store, because we picked up from every store one to three cases. I am quite sure this party could not have had the benefit of more than three CARES.

Sharon, Pennsylvania, is in my territory. I know the News Telegraph of Sharon, and Neighborhood Grocers. That is Rosenbloom & Company. It is really a voluntary chain, but it is an association of retailers and Rosenbloom Company is the jobber. I have not seen before the ad of Neighborhood Grocers von show me in the Sharon News Telegraph, March 10, 1933. I do not question that it is an authentic copy of that newspaper. The Kellogg Company had nothing to do with getting up that ad. We never encourage the advertising of our product as shredded wheat, as in this paper, with the name Kellogg's on it. We try to establish the name Kellogg's Whole Wheat Biscuit and show the difference. I have not seen one of those ads there. It is really an unusual happenstance in this territory. Practically every ad mentioning our biscuit has featured Kellogg's Whole Wheat Biscuit. Plaintiff's Exhibit 206 is the sheet you have shown me.

The Kellogg Company, about a year ago, had a considerable broadside of reading-matter advertise. ments on Whole Wheat Biscuit. Page 29 of the Pittsburgh Press for March 25, 1932, being Plaintiff's Exhibit 207, is one of the regular ads. The one I testified to before was a forty-inch ad I gave you before. This is a regular ad. That was run frequently last year in

the Pittsburgh papers. I recall it.

I recall an ad, one of a series, such as you show me in the Johnstown Tribune, Plaintiff's Exhibit 12-CC, on interrogatories. It is one of the Kellogg Company's series. I think that is a regular ad we ran the year before last, 1931. We had some advertising in Johnstown and several other towns.

We have a form of demonstration in stores, in which an assortment of three packages is sold and one package of Whole Wheat Biscuit is given away. I am not aware that our demonstrators have, in some instances, been calling it Shredded Wheat. I would doubt very seriously that that was the case, since we have instructed our men throughout to call it Whole Wheat Biscuit, to establish that name in the consumers' minds.

We have no women demonstrators at all, nothing but our own salesmen. It may have happened as you say in this instance, that they were asked what the product is and referred to it as a shredded wheat product. They might describe it as that, but they would refer to it as a name, as Kellogg's Whole Wheat Biscuit, and refer to it as the company does, in the same

way, on the end of its present box.

The box like Plaintiff's Exhibit 161 was first introduced. I think, early last spring, a year ago, when I first saw the wendow package. At that time, I believe it was printed just as Plaintiff's Exhibit 161 is. I see there is a difference between that and Plaintiff's Exhibit 168. I would say Plaintiff's Exhibit 168, with the food value is the earliest one. I believe it is the one we first had. I do not know when Plaintiff's Ex-We had these packages hibit 161 first came out. shipped to us, and our men distributed them in the stores, making displays with the regular merchants' own products. We have not used this open-faced package recently. They have not had any in the territory. They do use a package like Plaintiff's Exhibit 161, with the picture of the dish with biscuit in, on both panels,

and printed like Plaintiff's Exhibit 161. I would say that came out in this market late this last fall, along in November or December. I notice, as I hole it in my hand, there is a difference in the picture of the biscuit in the dish. Now, I think Plaintiff's Exhibit 161 was the early package, with the certified for food value. I am now reversing what I said before.

The package like the one I am holding in my right hand, Plaintiff's Exhibit 161, carries the same printing and is a comparatively new package. It is our current package. I guess it must be our last package. I notice the representation of the dish. I am

not very familiar with it.

Prior to July, 1930, we were using Whole Wheat Biscuit in cartons like Plaintiff's Exhibit 165. In the middle of 1930, we ceased calling it shredded whole wheat and began calling it Whole Wheat Biscuit. Since that time we have done all our intensive work on that product.

RE-DIRECT EXAMINATION.

THE WITNESS: There was not a large volume built up on that Whole Wheat Biscuit. The A. & P. do not a stock before there is a demand. The A. & P. Company stocked our biscuit in all stores out of the Altoona warehouse three and a half weeks ago, due to a demand created in that market for Whole Wheat Biscuit. Two weeks ago, they stocked them in their Pittsburgh stores from the Virginia warehouse, following, also, a demand for them.

In the restaurant trade, the small Nicgara shredded wheat package followed our individual package. The small one, like Defendant's Exhibit 81, was first reported to me from Erie. They had distribution in Erie restaurants on the small-sized package in the early fall of last year. That was the first I had heard about it.

We have our salesmen in the territory make arrangements with some large retailer having a lot of Saturday customers, not doing a lot of telephone business. He arranges an ad to feature the sale, on Friday, and it refers to Kellogg's Whole Wheat Biscuit. Our salesman conducts the sale on Saturday, selling three packages Kellogg's products assorted, and giving one package biscuit free, acting as a salesman in the store all day long. The featured product is not necessarily the one given free in the combination. We try to have an assortment of four different products. As a rule, we give Whole Wheat Biscuit free. Some places, we have sold Whole Wheat Biscuit and given some other moduct free. Those sales have been regarded as very successful, and we repeat them. We aim to go to different sections where we can get good coverage, figuring we get four different products into the home by this type of sampling, all Kellogg's products.

We supply bids to institutions in our territory, in response to invitations. The two papers you hand me are copies of such bids, both relating to Whole Wheat Biscuit. One is a specification of Whole Wheat Biscuit, Kellogg's, from the tubercular sanitarium at Cresson. These copies of bids are in the same condition now as when we received them. We did not write in anything, except that, in the Western State Penitentiary one, we typed in the name when we returned the bid to them.

The bid from the Western State Penitentiary, Defendant's Exhibit 85, calls for twenty-four cases of shredded wheat biscuit, twelve and a half ounces, meaning either National Shredded Wheat or Kellogg's Whole Wheat Biscuit, so many ounces. Ours is twelve and a half ounces, and theirs is twelve. We typed in Kellogg's Whole Wheat Biscuit, twenty-four twelve-

and-a-half-ounce packages to the case. The bid went in that way, was accepted, and the order was filled.

The bid from Department of Health, Tuberculosis Sanitarium, No. 2, at Cresson, Defendant's Exhibit 86, specified itself the Whole Wheat Biscuit, Kelling's. We typed in: Fifteen biscuit to the package, twelve and a half ounces weight to the package, Kellogg's.

That was also accepted.

I think I have a bid from the Soldiers' and Sailors' Home at Erie, in which they specify Kellogg's Whole Wheat Biscuit. I have a notation here from Major Smock: "On two occasions during this contract when I ordered this item, I received Shredded Wheat." So they specify here Kellogg's Whole Wheat Biscuit. The jobber, Curtse & Company, shipped them National shredded wheat. I do not know whether the signature on the copy of hid, Defendant's Exhibit 87, is the signature of Adjutant Smock or not. He read that to me. That is the way it read when it came to me.

RDQ: 207. I think you told me that this Pennsylvania Soldiers' and Sailors' Home Award was filled by you, according to the specifications, with Kellogg's

Whole Wheat Biscuit.

A. The Pennsylvania?

Mr. VILAS: It was not awarded to Kellogg. .
It was awarded to Curtze.

RDQ. 208. Ten cases.

A. Yes, but Curtze shipped them National Shredded Wheat in place of that.

Mr. VILAS: That is your inference from what you see written on the paper, is it not?

THE WITNESS: Yes, I also called up Curtze & Company, and they looked up their records and found out that that is what occurred, that the

National shredded wheat was shipped. They had the records at Curtse & Company.

RE-CROSS-EXAMINATION.

THE WITNES: In some instances we have induced institutions to specify Kellogg's Whole Wheat Biscuit. We have also had instances in which shredded wheat was specified. For example, in Defendant's Exhibit 85. Western State Penitentiary, the quotation request reaching us carried the item twenty-four cases shredded wheat biscuit, twelve or twelve and a half ounces in each, as per state specifications, G-36. I have no copy of that. That was a specification as to what shredded wheat should be like. It was either Kellogg's in the twelve-and-a-half-ounce package, or National in the twelve-ounce. The specifications, I think, did not mention them by name. My testimony on direct that this meant Kellogg's Whole Wheat Biscuit was my inference drawn from the fact that it specifies twelve or twelve and a half ounces to the package. I presumed the twelve-and-a-half-ounce package had reference to our Kellogg's Whole Wheat Biscuit. The part filled in on the typewriter in black: Kellogg's Whole Wheat Biscuit, packaged twenty-four twelve-and-a-half-ounce packages to the case, was filled in by me.

As a rule, the bids call for twelve or twelve and a half ounces. In many cases they refer to Kellogg's Whole Wheat Biscuit. In many instances in which we sold our biscuit to institutions, they specify it. We have an institution man who handles all this business. I do not get a chance to look at all institution bids.

I have seen army bids calling for shredded wheat. When we get such a bid, we specify what we have and make a bid on it. We frequently get the contract on a bid like that.

RE-DIRECT EXAMINATION.

THE WITEES: We have distribution of Whole Wheat Biscuit in the Kroger stores in our territory, secured after there was a demand for the product. Their policy is similar to that of the Atlantic & Pacific Company. It is put in after the demand has been created. I think they run one hundred and sixty-seven stores now, out of the Pittsburgh warehouse.

RE-CROSS-EXAMINATION.

THE WITNESS: They carry shredded wheat and did so before they carried the Kellogg biscuit.

WILLIAM P. WELTON.

Deposition taken at Pittsburgh, Pennsylvania, March 23, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocery with a meat and grocery store, two clerks steadily. I generally have two to four. We take telephone orders and deliver and all accommodations. We have goods stacked up on the floor, so a woman can go around and help herself.

We handle Kellogg's Whole Wheat Biscuit and have done so between three and four years. We also handle the Niagara Falls shredded wheat. I have handled that quite a long time. Of the two, Kellogg's biscuit is now outselling shredded wheat. That represents a consumer demand. We sell quite a bit of it through advertising. The volume is increasing. The volume or demand for the shredded wheat product is decreasing, I guess.

When a consumer asks for Kellogg's product, they generally ask for it as Kellogg's Whole Wheat Biscuit. The other product is known as shredded wheat. If a customer asks me for shredded wheat, she gets the Niagara shredded wheat. If she asks for whole wheat, she gets Kellogg's Whole Wheat. 'If she would ask for Kellogg's shredded wheat, I would have to ask her if she wanted Kellogg's Whole Wheat or shredded wheat, because there is a difference there. We do not substitute in our store. We give the customer what she wants. We belong to a voluntary group, in which the stores are uniform in name and set-up. They are Clover Farm Stores. It is laid out in different groups. In our group there are about a hundred and fifty members. Altogether, I guess there are about four or five thousand members, all under the name of Clover Farm Stores. I guess the rest of the groups carry Kellogg's Whole Wheat Biscuit, because it appears quite often in our advertising. We feature it. Where a product is featured in advertising, it is carried in the stores of the group. We display it and suggest it to the customers. Kellogg's Whole Wheat Biscuit has been displayed and suggested in that way. It is always displayed, and you can help yourself in the store. Lots of time, we have it in window displays.

The store and window displays always help in increasing the consumer demand for the product. When a new product comes into our store, we always make a display of it in the middle of the floor, in a sort of pyramid. We have a few right near the counter and suggest it to customers. We have Whole Wheat Bran now introduced that way, a five-cent article, in a bushel basket, right in the middle of the floor.

There is no confusion in our store between Niagara Falls shredded wheat and Kellogg's Whole Wheat. I have never, personally, confused the Kellogg package with the Niagara Shredded Wheat package. We had shredded wheat for ten cents for a time, then eleven, and the current price is twelve. Kellogg's Whole Wheat Biscuit runs about the same. The last three or four years, I believe the National Biscuit Company has manufactured Shredded Wheat. Before, it was the Shredded Wheat Company of Niagara Falls. We handle a few of the National's cookies, crackers, but not their whole cracker line. I buy the shredded wheat through the Clover Farm organization. We get our discounts automatically.

Consumer demand for Kellogg's Whole Wheat Biscuit has been created through their own efforts, through advertising, putting their goods on the market, perpetual advertising and getting behind it. Their salesmen call on me, watch my stocks, and take my orders, straighten them up, help me make displays,

sometimes, which helps sell the product.

I handle practically all the Kellogg line. It is pretty well known. The Kellogg name on Whole Wheat Biscuit is a great advantage from the standpoint of creating consumer demand. The Kellogg Company gives no advertising allowance to the retailers or our organization, that I know of. I do not think they do. I do not know. We never got any allowance at cur store.

Customers in a retail grocery store tend to shift around from one item to another. You may have a woman buy one thing today and she may buy something else a day or two later. The largest selling cereal in my store now is Bolled Oats, then Kellogg's Corn Flakes. I think Kellogg's Post Bran will come next, then Whole Wheat. I do not mean Post's Bran, but Kellogg's Bran. We have them both. After that Kellogg's Whole Wheat Biscuit. Then I will say shredded wheat would come next.

We buy Kellogg's products through the organization.

CROSS EXAMINATION.

THE WITNESS: My group buys through a jobber, the Fox Grocery Company, at Charleroi, Pennsylvania, who has a concession from the Clover Farm Stores. That is, they have a certain district assigned to them; and they act as nucleus or center of the independent retailers who call themselves Clover Farm Stores. I am one of the members. I secure from Fox Grocery Company nearly all my staple supplies.

We handle a few National Biscuit Company goods, which we get direct from the National Biscuit Company. The salesman calls on me. I do not buy National products through the Fox Grocery Company. I am at liberty, in my dealings with Fox, to patronize other manufacturers. They do not dictate that I shall not buy Strietmann's or somebody's else crackers. I have been in the grocery business about seventeen years. I have not been with the Clever Farm all that time. I have been an independent grocer all that time, service store, for myself. I have always been selling groceries or meats, longer than seventeen years, all my life. For at least seventeen years, we have had shredded wheat on our shelves, and I have been familiar with it, in a package something like Plaintiff's Exhibit 1. I recognize the package. I recall also having it in a package like Plaintiff's Exhibit 10, with a picture of a dish on the end. I remember that package some years back. It was used for quite a while, with a picture of Niagara Falls on one end and of the dish on the other. I cannot say I ever used that in making my displays of shredded wheat. I remember shredded wheat was a very widely advertised product up until this last few years. Then I do not think they advertised as much as before. During my experience as an independent grocer, it was a very wellknown and popular product. People asked for shredded wheat. When anybody did so, I had no doubt what they meant. We knew what they meant. That was the only product that answered that call, until Kellogg's Whole Wheat Biscuit came on the market, there was nothing else like it. There was a small round one put out, called Muffetts. We handled them, but not now. They fell down on the advertising, and the sale of it dropped. Muffetts is a round cake, and they were good, too. It was on the order of shredded wheat biscuit, made out of wheat.

The Kellogg biscuit come only one or two with the window, like Plaintiff's Exhibit 161, in a case; and the rest do not have the window. We use the window packages for display. They show the ends of the biscuit through the cellophane, so the customer can see what is in the package. We use those for display, but we do not keep them too long. If they become shopworn, we move them out. Both products, Kellogg's biscuit and shredded wheat, have the same display in my store at the present time, right up on the shelf, where the customer can go and take either one he wants. Kellogg advertised their biscuit so much; and we have it on our special slips, so we put it in the window, and then we put it on the floor display. We do make a special display at times for shredded wheat. We have sold them for a dime and did not make any money on them. I pushed them over the counter for ten cents.

We have suggested Whole Wheat Biscuit to our customers. We never suggest shredded wheat to our customers in preference. If they come in for shredded wheat, they will get it without any question. I never said: "Try Kellogg's shredded wheat," and showed them that. Kellogg's Whole Wheat Biscuit has, in my store, forged shead of shredded wheat sales. I

could not say that any of my customers who now buy Kellogg's biscuit were former shredded wheat customers. I do not know what kind of breakfast food they have been using. Kellogg's biscuit being on the same line as shredded wheat, anybody who likes shredded wheat would naturally try one and try another one.

When I said there was no confusion in my store between the two, I meant I know them apart. I would not make any mistake between the two. If a customer asked for Kellogg's Whole Wheat Biscuit, I would not give her shredded wheat. I would make no mistake in reaching for the package. That is what I mean.

I do not remember the Kellogg product when it was marked shredded whole wheat. All I have known is Kellogg's Whole Wheat Biscuit. I do not recall any package like Plaintiff's Exhibit 165. The only package I remember seeing is one like Plaintiff's Exhibit 161, with a picture of a dish and two biscuit, and the name: Kellogg's Whole Wheat Biscuit. I have had it for a long time. I do not remember ever seeing the other. We are now selling the two items, I think, at the same price. I suppose I make about the same profit on both. My wife takes care of the figures on the financial end of it. I suppose the Kellogg biscuit shows me a little better profit than the shredded wheat.

HARRY L. SNYDER.

Deposition taken at Pittsburgh, Pennsylvania, March 23, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a grocer, with two stores, under the name of H. L. Snyder & Son. They are regular service stores, with telephone orders, deliveries

made, and credit extended. We have self-service features in the stores.

We handle Kellogg's Whole Wheat Biscuit in both stores. We also handle Niagara shredded wheat. We have had a demand fe both those products in our stores. If a customer asks for shredded wheat, she gets shredded wheat. If she asks for Whole Wheat Biscuit, she gets Kellogg's Whole Wheat Biscuit. Our customers do call for those two products that way. They are priced both the same, twelve cents. We have had store displays and window displays on Kellogg's Whole Wheat Biscuit. The Kellogg salesman calls regularly on us, does not neglect us. We handle the rest of the Kellogg line. Kellogg products are well known. If the name Kellogg's on the package would do anything. I would say it would help the sale of it. If the customer had a good opinion of the other products, it might help a little.

In my store, I introduce a new product by making a display of it and calling the customers' attention it. If I can, I ask them if they have ever tried it and would like to try it. I have not had any packages of Whole Wheat Biscuit with cellophane fronts. Mine are with solid fronts. Some customers would shift around from product to product in the cereal line, and some would stick. I do not try to keep a record of that. I know they shift in some things, particularly coffee. Whether they do on this, I could not

say.

CROSS-EXAMINATION.

THE WITNESS: I have customers who like a certain brand of cereal, crackers, or something and stick to it. They always insist on having the same thing. I cannot say that it would be true of shredded wheat. When a customer likes a certain thing, he will stick to it; for instance, Mother's Oats. They stick to that

all the time. I believe I can say I have some customers who stick to shredded wheat. I will not try to say for certain, because I do not keep track of or watch those things. I have been a grocer since 1900. I was out two years at one time and two years at another, but I was connected with the same business during that time, more or less actively connected with the grocery business during the entire thirty-three years. I have been familiar during that time with shredded wheat. I do not remember when it started or whether it was in the grocery line the first time I was. I was too young. I cannot remember a time when I had grocery stocks in the stores and did not have shredded wheat. It has always been in a package something like Plaintiff's Exhibit 1. and, to the best of my knowledge, it has always been a biscuit of the same size. shape, and general appearance. It has always been a pretty good steady seller.

I have never had any sales of anything at any time. I have had displays of shredded wheat. So far as introducing it is concerned, I would think the time for that has long since passed. People have called for that product, throughout my entire experience, by the name shredded wheat, as far as I can remember. I never knew it to be called for by any other name. I would think it is a name very familiar to the public, and I would suppose it has always meant this product made at Niagara Falls. I know of no reason why it would not. It might be possible some people would not know it was made there. It means that product to the public, however, and it still means it.

There is no doubt in my mind that the words shredded wheat mentioned would mean just exactly that shredded wheat; but whether that would be such as to make it the same as a trade-mark or not I am not sure. I would not attempt to pass upon that question.

I do not yet belong to any voluntary chain or buying group. They are seeking to open up in the City
of Pittsburgh. If they conduct their business the way
I think they should, I will go in. If it is the same as
those in business now, absolutely not. I run my ewn
business, absolutely. Nobody's else name will go on
it. I run a service store, take orders over the telepione, and make deliveries. On Saturday, a good percentage of our orders come over the telephone; but
about 60 per cent. on an average, or a little more.

We get orders for shredded wheat over the telephone, and that is the product they get. That is what has kept me in business for so long a time. We give customers what they ask for. As I told Mr. Clarke, if we have a new product in the store, we will display it and suggest it to customers. When Kellogg's Whole Wheat Biscuit was first put into my store, we had a display of it on the counter. I would not say I did not suggest it or show it to my customers. I might have. I could not say whether any of my present Whole Wheat Biscuit customers are former shredded wheat customers.

of the two, I sell most shredded wheat now. I do not hesitate to say it is the biggest seller. That is not hard to tell. I could not give the exact percentage. I am a user of other National Biscuit products and carry them in the store. We carry the cracker line. The National name attached to any item might be a pretty good selling point to some people. I could not say. There is no question that the name National Biscuit Company would mean something to some people, the same as Kellogg's would. The name Kellogg's does not have a monopoly on good will. Nobody has. When people ask for Kellogg products, they also ask for Whole Wheat Biscuit. Nobody asks for Kellogg's shredded wheat. To my knowledge, nobody ever did.

CLIFFORD B. TRUNICK.

Deposition taken at Pittsburgh, Pennsylvania, March 23, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a partner of the firm of C. P. McLaughlin & Company, grocers, with just the one store. That is a regular old-line service store. Most of our business is over the telephone. We have two trucks for making deliveries, and we extend credit very extensively. 'We have some self-service features, When the department was remodeled, we installed a system, believing the women would wait on themselves more than they do. They cruise around somewhat and wait on themselves.

We handle Kellogg's Whole Wheat Biscuit and have had it, I would think, about four years. We also handle Niagara shredded wheat. We have handled that I think ever since I have been in business, thirty years. I have been there, anyway, twenty-five, and I know I have handled it ever since I have been there. There is a consumer demand for both products.

If a customer asks for shredded wheat, she gets the regular shredded wheat. As far as my clerks know, there is no other. Customers asking for the other product specify Kellogg's wheat biscuit or Kellogg's wheat. We have never had any confusion or mixup between those products in our store. Unless a customer specifies Kellogg's, he gets shredded wheat. If a customer asked for Kellogg's shredded wheat, we would give her Kellogg's biscuit. We never had any customers, to my recollection, send back either product and say they wanted the other. I cannot see where the name Kellogg's would hurt the sale of Whole Wheat Biscuit any. We handle Kellogg's Whole

Wheat Biscuit in the full-front package, like Plaintiff's Exhibit 167. I do not have any in cellophane-front packages like Plaintiff's Exhibit 161.

The last year and a half or so, quite a few new items have come in over the Triangle, which we joined when they started, and such items as we introduced have always met with real popular demand. We put them on display in the window and the store. Anything on the list we put in for three days, Thursday, Friday, and Saturasy, for the sale. Circulars go out, specifying all the items on the list, about thirty at the present time. That has been an effective method with us of introducing a new product. We have given Kellogg's Whole Wheat Biscuit the same co-operation by the same methods I just described for introducing new products.

The Triangle is an association run through the Creasey Company. They have about two hundred members. It is a voluntary chain. Members put the insignia of the Triangle organization across the front of the store. The prominent name of our store is Mc-Laughlin. The Triangle chain gives us certain buying privileges. We pay for advertising appearing in Pittsburgh papers, amounting to \$7.70 a week, including a thousand hand-bills. I think it is two-forty or threeforty for the hand-bills and three something for advertising, a dollar extra for my own advertising. It amounts to \$13.77 a week. Two ads are put in each week. I think Kellogg's Whole Wheat Biscuit have had the benefit of that service two or three times. No allowance for advertising has been made by the Kellogg Company to us. It might have been in the shape of a reduced price to the Creasey Company, but I would' not have any knowledge of that, either way. I do not know whether they would reduce prices on our stuff. It has happened on different items. For instance, we had been buying College Inn direct from them. To get, an advertising offer from them, we bought it through Creasey, through Triangle, at seventy-five cents a dozen cheaper. We always had two prices for it, all the way from five per cent. up. We put on specials and

sold quite a lot.

The Kellogg Company has conducted Saturday sales or demonstrations in my store on Whole Wheat Biscuit and the rest of the line. We sell shredded wheat at twelve cents and Kellogg's Biscuit at ten, or on special sales, two for nineteen. I think shredded wheat has been priced eleven cents occasionally by other chains, for quite a time, and, on special sales, ten.

CROSS-EXAMINATION.

The Witness: I have been connected with the Mc-Laughlin Company twenty-five years and am part owner of it now, have been for the last fifteen years. Before that I was in the dry goods business, about two years. At eighteen, I went to McLaughlin's. During that time, I have been familiar with shredded wheat like Plaintiff's Exhibit 1 or a similar package, and no change in the biscuit itself. It has been a very well known article and a good seller all these years. People have known it by the name shredded wheat and by no other name. That is really the only name we ever get shredded wheat. When our customers ask for shredded wheat, they get that at our store, and they get nothing else but shredded wheat.

If they asked for Kellogg's shredded wheat, they would get Kellogg's Whole Wheat Biscuit. I told Mr. Clarke the name Kellogg's does not do the product any harm. I mean that Kellogg is a well-known manufacturer, and it is an acceptable product to people seeing the name Kellogg's on it. The name of National Biscuit Company does not do any harm either. As far as we are concerned, we do a nice business with the National Biscuit. We also carry their cracker line.

Our package of Kellogg's biscuit is like Plaintiff's Exhibit 167. I have never examined the reading matter on that package. I see now on one end of the package: Shredded wheat in its most delicious form, and, on the other end: a shredded wheat product. I have not handled this stuff, but I have the other. I would not know what was on your package, either. I never get down to the fine matter myself. No doubt the trade would. In looking for recipes, they might look at the

reading matter on the packages.

I know shredded wheat appears prominently on the plaintiff's package, and the expression: A shredded wheat product appears on the Kellogg package. They talk about shredded wheat. Is what is in that package shredded wheat? I mean by that a biscuit shredded, composed of shreds or threads of wheat. I have seen shredded coconut and shredded soap. It is forced through a fine hole of some kind, is it not? I would not say cut up in pieces, but more like macaroni or noodles. I have never been on a farm and seen a corn shredder operate. I have seen shredded wheat made. I know the wheat berry, after being steamed, is pressed into a long thread. That is my idea of a shred. I think that is a shred, so I think Kellogg's biscuit would be a shredded wheat. I would think the designation on the end of the Kellogg package: A shredded wheat product, would not be a misnomer, any more than corn flakes would be a flake. I would think it describes the item.

I have sold a lot of shredded wheat in a package like Plaintiff's Exhibit 10, with the dish on the end, which was used a good many years by the Shredded Wheat Company.

I do not think I first learned of Kellogg's biscuit through the Creasey Company. Their man tried to sell us the idea, as I recall, seven or eight years ago. I think at that time they called it shredded wheat, Kellogg's shredded wheat. It was called shredded wheat and is still referred to as Kellogg's shredded wheat.

When Kellogg's biscuit was first introduced into our store, that is, since we had any real sale on it, it came through the Creasey Company. I would not know whether the present sale of it is a new created demand or at the expense of shredded wheat. Their advertising might have some influence on some persons to try it. I think there is no doubt that a shredded wheat customer might be influenced to try Kellogg's Whole Wheat Biscuit. At the present time, shredded wheat outsells Kellogg's biscuit in our store, notwithstanding the difference in price.

RE-DIRECT EXAMINATION.

THE WITNESS: I have no doubt that shredded wheat like Plaintiff's Exhibit 1 is shredded wheat. I know I saw it made at Niagara Balls, and I know how it is made. That is what I meant when I called it shredded, and I do not think they have changed it.

RE-CROSS-EXAMINATION.

THE WITNESS: The great length of time this product has been called shredded wheat may have a little to do with it being natural for anyone to call Kellogg's biscuit a shredded wheat biscuit, Lecause of the association of that name with that kind of biscuit; but I really think practically any business they are doing on it is the result of advertising. With the amount of advertising these people have behind them, they have undoubtedly created something in the public mind. I do not think it is easier to create a demand by the public for a biscuit like that because they already know of such a biscuit, as far as their own case is concerned, because they have not really created a demand for it.

On the Triangle buying, three times on those sales a cut of the package has appeared on the Triangle list, and we really sell at those times more on one or two days than we do at other times in a month. It is not a repeating demand, so far as we are concerned. At those times we are offered a Wheel of Knowledge, and they took very well with the children. That helped move the product out. Previous to that, we never sold any at all; but we do have them repeat on it now. They call for the product as Kellogg's Whole Wheat Biscuit.

When shredded wheat was first made, it was, to my mind, an absolutely new product. There had never been anything like that. No doubt, the Shredded Wheat Company spent a vast amount of money educating the public to eat that product. It was called various names, like bale of hav, and excelsior. I called it a bale of hay, myself, when I first saw it. It was more or less held up to ridicule, and the Shredded Wheat Company, by intensive work throughout the years, has made it a household article throughout the United States. Almost every kid knows shredded wheat. So the problem of the Kellogg Company in advertising their product was made a little easier by reason of that fact. An amount of advertising would belp any proposition. The people did not have something totally strange to them. They came out with a picture of their product in a dish on the carton, which at once suggested shredden wheat to the public. I do not see where the pioneer work has been done more for them on that than it would be on any other item, such as Corn Flakes, which were new at one time. No doubt, there are a dozen brands of corn flakes introduced. I do not know that there are so many of the Whole Wheat Biscuit. I only know Muffetts besides these two. It ches not look like shredded wheat biscuit. It is round. It is not the same at all. Shredded wheat is larger, and Kellogg's biscuit is a smaller cake. In other respects they have the same appearance.

MRS. MIRIAM K. GRANGER.

Deposition taken at Pittsburgh, Pennsylvania, March 23, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, with a husband; no children, and no other members of our immediate family. I have no other occupation. I use Kellogg's Whole Wheat Biscuit and have used it about six months. It first came to my attention by receiving a sample package at my door. I liked it and have continued to use it since. In ordering it I ask for Kellogg's shredded wheat. When I do, sometimes I get another biscuit. My groter is the A. & P. on Beverley Road. They stocked it about six months ago, and then they discontinued it for some reason. We had to insist rather emphatically on their stocking it again. They had National shredded wheat on their shelves, and they seemed to think one shredded wheat biscuit was sufficient for our use. Just within the last three weeks, Kellogg's biscuit has been back on their shelves.

I had formerly used National shredded wheat. I have been keeping house for six or seven years and used it during that time. Of the two products, I prefer Kellogg's. I have used no other since. I have kept it on my shelf ever since I had the sample. I prefer it because of the size.

I never had Niagara Falls biscuit delivered when I asked for Kellogg's except our grocer said he carries one shredded wheat and feels that should meet my needs. He did not try to sell me anything else when I wanted Kellogg's. He never tried to substitute. He did not understand why we preferred the other.

CROSS-EXAMINATION.

THE WITNESS: I prefer Kellogg's biscuit because of the portion, and I prefer it because it is so much

crisper. I had known shredded wheat for a long time before and always knew it as shredded wheat. I do not think I knew about it before my marriage. Mother liked cooked cereals. We never had raw cereals at all. I give this raw cereal to my husband. He used to use the other. He knew the difference. We were glad when Kellogg came out with Whole Wheat Biscuit and gave us something we liked better than the other.

The sample package just had two biscuit, left at our house. After that, I asked for it at my grocer's. Mr. Ander asked me if I would come down here today, because he knew we were interested in it. He moved in the same apartment when we came to Pittsburgh, and he knew we liked Whole Wheat Biscuit. I serve the biscuit just as it comes out of the box, no heating, just the same as shredded wheat.

RE-DIRECT EXAMINATION.

THE WITNESS: We moved to Pittsburgh, lived here for two years, then moved to Michigan and back. I have known Mr. Ander all the time. The sample delivered to our door was entirely independent, delivered by a sample man. I had never known of Kellogg's Whole Wheat Biscuit or talked to Mr. Ander about it before they gave me that sample.

GEORGE WILLIAM DRENNING.

Deposition taken at Pittsburgh, Pennsylvania, March 23, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a grocery man with my own store, conducted under the name of Clover Farms, a voluntary group. It is an old-line grocery, with telephone orders, making deliveries, and extending credit.

We have counters down the center and work in there. We have shelves out where people can help themselves: Our shelving is five feet high, with cereals all around the top, so they can help themselves, go around, pick out what they want, and put it on the counter.

I handle Kellogg's Whole Wheat Biscuit, having carried them ever since they commenced making them. I sell them in solid-front packages, like Plaintiff's Exhibit 167. I also handle Niagars shredded wheat. Of the two, Kellogg's sells the most in my store by about five cases to one. Niagara shredded wheat is not a very live item in my store. I do not sell very much of it. On the telephone, they call for Kellogg's Whole Wheat Biscuit.

If a customer just asks for shredded wheat, I ask them which one they want. We have no confusion in our store between the two. I have not had either product sent back with the statement they wanted the other. There is a consumer demand for Kellogg's Whole Wheat Biscuit. We have quite a demand for it. They mostly call and ask for Kellogg's.

Both the products are priced at twelve cents, placed on the shelf side by side. We have given the Kellogg Company dealer co-operation on Whole Wheat Biscuit in the way of store and window displays, and through Clover Farm advertising. Also, the Kellogg salesmen come along and give us cards and window displays.

We handle two or three numbers of National Biscuit Company besides Niagara shredded wheat. We handle some of their flake cracker. We also handle Colonial cracker line and some Loose Wiles. We get the same discount from National as we do from the other biscuit companies. National shredded wheat has been used by the chains as a price-cutting item. I have seen it advertised as low as nine or ten cents.

You lose money on it at nine cents. I could not sell it for that in my store at a profit.

CROSS-EXAMINATION.

The Wirkess: We have had Kellogg's biscuit on special sales, Friday and Saturday, at eleven cents. We have no special deals in our store. I have been in business for myself about seventeen years, but in the grocery business all my life, since I was seventeen. I have carried shredded wheat all that time, always. It has been a well-known product for many years, always known as shredded wheat. The public, my customers, ask for shredded wheat. They used to. They still, some few, ask for it in my store. We have not had any display of shredded wheat whatever.

I have been with Clover Farms about fifteen months. They do not push the sale of shredded wheat. We have never had it on special sales. They do encourage the sale of Kellogg's discuit. Before we handled Kellogg's, the shredded wheat was the only product like that, and it sold quite a little bit at that time. Since Kellogg's biscuit came into my store, it has supplanted shredded wheat, so it sells five to one. I attribute that, to a certain extent, to an aggressive pushing of the product by the Kellogg Company.

I have always carried Kellogg's products since I have been in business. I am a hundred per cent. Kellogg man. We have always handled everything they manufactured. We had Kellogg's Whole Wheat Biscuit before fifteen months ago. I have had it for several years and have carried it along with the other Kellogg items, ever since it was manufactured.

When people ask me for Kellogg's shredded wheat, I ask them which one they want, in order to avoid any confusion between the two. We give people the preference. If they want Kellogg's, we want them to have it. If they just ask for shredded wheat, we are not sure which one they want. Then we ask which one they want, Kellogg's or National. Lots of times, mostly they select Kellogg's under that designation. If they ask for it, we give it to them. If they just ask for shredded wheat, we give them a chance to say Kellogg's, and they do take it very frequently. They frequently ask for it as shredded wheat. I have had people say we made a mistake and sent the wrong one, that it was not the one they wanted, after sending them the National. Sometimes a clerk would do it. It has also happened the other way, but it does not happen very often. It is to my benefit to sell Kellogg's. I make a little more on it than I do on the National.

RE-DIRECT EXAMINATION.

THE WITNESS: The reputation of the Kellogg Company in the trade for fair dealing and non-discrimination in discounts is fine. I do not like to say much about the National Biscuit Company. I do not like their deals in many ways.

RE-CROSS-EXAMINATION.

THE WITNESS: I am not a National Biscuit Company man now. When we handled the National line, we handled the full line and they did not treat us fair. They gave the chain stores the big discounts. We got five or ten and had to sell so many more packages before getting a better discount. The chain store was getting the discount for the large volume they were buying. Orders were taken from a lot of stores and all jumbled together and put in as a big discount. We bad to sell more goods to get a better discount. At that time we had to sell a hundred dollars worth to get fifteen per cent.

RE-DIRECT EXAMINATION.

THE WITKES: The chain stores could purchase enough to get that discount, because they had Morrison there. They were doing no more business than I but were getting a big discount and I get a small discount.

RE-CHOSS-EXAMINATION.

The Wirmes: The discount was based on the amount sold to one store; and they were selling large amounts to the chain stores and a comparatively small amount to me as the owner of one store. I found it difficult to purchase and dispose of enough a month to qualify for the high discount. There was a good deal of feeling among grocers about ten years ago. I was not interested in the Federal Trade Commission case on that point, but I knew of it. I did not testify in it. I am, now, as a member of Clover Farm stores, getting the benefit of their buying discount from the National, Loose Wiles, and Colonial. We always had it in for the National Biscuit.

RE-DIRECT EXAMINATION.

THE WITKESS: Our requirements at that time were enough to fool them, but there were not enough buyers in our town to get it. I did not know that was one of the things involved in the Federal Trade Commission case, that they would not permit the independents to pool orders.

GEORGE WORBALL.

Deposition taken at Pittsburgh, Pennsylvania, March 23, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am president, treasurer, and manager of the Liederman Worrell Company, wholesale grocers, a regular old-line wholesale house, whose sales-

men travel the trade. I have been with them twentynine years. We have nine salesmen. We cover six
counties in the western part of the State, from Allegheny River north as far Ashtabula, and two counties
in Ohio. We service some of our customers from our
other house at Greenville, Pennsylvania. We have connected with us Clover Farms, a voluntary chain that
we service. We have a total of about seven hundred
fifty accounts, of which a hundred and thirty odd are
Clover Farm, the rest independent.

We handle Kellogg's Whole Wheat Biscuit. There is a retailer demand in our organization for that product. We also handle the National Shredded Wheat. I looked up the record this morning and found that we sold more of Kellogg's biscuit last year than we did of

shredded wheat.

We buy shredded wheat from the National Biscuit Company. I understand we get the same discount the retailer gets. We buy it from the National Biscuit Company at the same price the retailer can buy it for. That means we just get a little more for it than they get. To my idea, the retailer has to pay more for it when he buys from us than when he buys it direct from the National Biscuit Company. Our organization does not take very kindly to that kind of deal. A jobber usually gets some concession over the retail buyer.

We feature Kellogg's Whole Wheat Biscuit at times in our advertising. I would say a very large proportion of our accounts carry Kellogg's Whole Wheat Biscuit. I cannot say for certain about all. All our Clover Farm accounts handle it. They advertise the product and sale of Kellogg's biscuit. They give store and window displays and other forms of advertising.

Clover Farm Stores do not carry many of the National line other than shredded wheat. Some do have

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both lines. The hook-up of Clover Farm Stores is with the Loose Wiles Biscuit Company in a national way. At the time we were arranging a hook-up for our particular unit, they presented us a proposition, the National Biscuit, along with Loose Wiles at that time, and offered certain discounts. We accepted the proposition of Loose Wiles. National then went out and solicited business from our member stores at a higher discount than they had formerly given those same stores. That was after our decision to accept Loose Wiles was made.

Our Clover Farm Stores buy these goods direct from Loose Wiles or National, as the case may be. The arrangement was made by our Board of Control with the company they selected. Both propositions were presented to and considered by them, and they decided to accept Loose Wiles. That business goes direct to the retail stores and does not come through our house at all.

After that, the National Biscuit Company went out and solicited the business from our stores at a larger discount than they had formerly given the retail merchants. Some of the retailers fell for that, and some of them wondered why they could not do it before. I think it reacted against them in most cases.

As far as the product itself goes, we never had any confusion between National shredded wheat and Kellogg's biscuit in our retailer trade. I never had a retailer return either product and say it was the other he had ordered.

CROSSIEVAMINATION.

THE WITNESS: I did not mean to imply that it was a crime by the National to try to get business from Clover Farm Stores; but the trade wondered why they could not give the larger discount before we hooked up with Loose Wiles. The National and Loose Wiles

are competitors. If our Board of Control had not hooked up with Loose Wiles, they might have done the same thing. We could not make a hook-up with two people. It is natural for two competitors to sell their product where they can. That is what they are in business for. Notwithstanding the disfavor the National has in the eyes of my organization, Clover Farms, they have the right to sell their products. With many stores equally as good as ours, why do they hold them down to a lower discount? I did not say there was any crime committed by the National Biscuit Com-

pany in doing that.

When the Board of Control made the decision, it had the effect of a recommendation to the members of Clover Farm Stores to patronize the Loose Wiles Company. If they were loval to the organization, they would not deal with any other cracker company. There was no rule prohibiting them from so dealing, but a moral obligation, the obligation of mutual co-operation under which they had entered the organization. They enter into a contract with Clover Farms or our organization; but that contract does not prohibit them from buying outside the recommendation of the Board of Control. The recommendation, however, has a good deal of weight with the members, so we are able to direct a great deal of prestige in favor of Loose Wiles or any other company we recommend. That applies to different hook-ups on different products. We have no hook-up with the Kellogg Company on their products, but we do favor the Kellogg Company. We feel that way. Practically all Clover Farm Stores carry the Kellogg products, including Whole Wheat Biscuit. I would imagine a majority of them carry shredded wheat, which is a product we have carried for a great many years. We always stocked it when the Shredded Wheat Company owned it, and it has been a good seller. We bought it often in cars from Niagara Falls. until they notified us they would not let us have the discount, 17½ per cent. Almost any Clover Farm member who buys a reasonable amount can get that discount, because he is a member of the Clover Farm group, I guess. The National Biscuit Company is selling shredded wheat direct to the retailer instead of through the jobber. Kellogg's biscuit is the largest seller of the two as far as we are concerned, and we handle a lot more of it. That is accounted for, at least in part, by the fact that National services the retailer direct. I suppose they take a lot of business we formerly had. There is no question about that

Up to the time National took over shredded wheat and started distributing it direct, Kellogg's biscuit did not sell more than National shredded wheat. It has only been in recent years. I would hardly say that Clover Farm Stores handle all Kellogg products under the recommendation of the Board of Control. Advertisement of an item in our weekly ads implies at once that we are interested in it. If we were advertise ing for them, we would pretty nearly have to have it in stock, so we could advertise for that business. We have not advertised shredded wheat.

We get considerable co-operation from the Kellogg Company in deals they give us and premiums of different kinds. They often have a prize of some kind. A year or so ago, they asked us to get a list of school children over our entire territory. We nearly swamped them with names, to which they sent out prize packages. A thing of that kind helps create demand for their line. When I speak of prize, I do not mean a prize or reward to our house for handling it. They make no advertising allowance. I think we pay them just the same as any other jobbing member.

When I told Mr. Clarke there is no confusion between the two products, I meant that there is no doubt 0

at all in my house as to which is shredded wheat and which is the Kellogg product. I have been in this location twenty-nine years. I have been in the grocery business a great deal longer than that. I have been in the wholesale grocery business about forty years. I do not recall just when shredded wheat was introduced; but I can hardly recall a time when I did not have it. It has been in a package like Plaintiff's Exhibit 1. It has always been the same product and always known as shredded wheat.

ALOYSIUS HARVEY.

Deposition taken at Pittsburgh, Pennsylvania, March 23, 1933.

DIRECT EXAMINATION.

THE WITNESS I am in the restaurant and confectionery business. I have been in the restaurant business seventeen years. We handle cereals in my restaurants, serviced in the individual cartons. I have two girl helpers, sometimes three. I also have two cooks. All the serving is done by the two or three girls in the store part. They open the individual cereal packages at the counter and at the tables. If it is at a far table, they generally open it at the counter. Anybody can see it. The customer can see if the package is opened.

I handle Kellogg's Whole Wheat Biscuit in the individual cartons, also their All-Bran individual size, and then the other cereals, like Post Bran, in the larger packages. I do not carry Whole Wheat Biscuit in the large package. We carry Kellogg's Corn Flakes. We carry the larger packages for them to take home, a sort of grocery service.

Kellogg's Whole Wheat Biscuit in the individual carton sells right along in my restaurant. I never had

a complaint about it or had a customer say it was not what he wanted. I handled Niagara shredded wheat, until the National took it over and reduced the size of the individual carton. This is one of the individual cartons of Kellogg's biscuit, Defendant's Exhibit 80. I used to handle National shredded wheat in an individual carton like Plaintiff's Exhibit 21, with two biscuit in the package. When the National Biscuit Company took it over, they gave me a smaller carton and cut the size of the biscuit down. I think it was smaller than Defendant's Exhibit 81. Comparing the two, that looks like the old one and this the new one. When the new smaller-sized carton, like Defendant's Exhibit 81. was given me, I no longer carried National shredded wheat. About that time I put the Kellogg biscuit in and have carried it ever since.

Cross-Examination.

The Witness: Prior to the time the National took it over, I carried shredded wheat for a great many years in my restaurant. It will be eighteen years next month since I took it over. Most of that time I think I have had shredded wheat, in the individual cartons with the same size of biscuit as were sold in the larger package. Shortly after the National took them over, they came out with the smaller biscuit. I did not buy any more after the first order. My customers were not satisfied with the size of the small biscuit. I had to open two boxes for one serving. There was not enough of it. When Kellogg came along with a package like Defendant's Exhibit 80, I took that on, notwithstanding that their biscuit is smaller than the old National shredded wheat.

I suppose the biscuit you take out of Defendant's Exhibit 80 is the same one. I identify the package, Defendant's Exhibit 80, as the one I am now carrying,

as far as appearance is concerned. I see the two biscuit in the box. That is the way it comes, with the partition between. That is the biscuit I am now selling. We are still serving the three of them. The package, Defendant's Exhibit 81, looks to be about the same size as the Kellogg individual carton. At our price, I still give the three biscuit and a little bran over. That is the way I served Kellogg's Whole Wheat Biscuit for the last year or two. I am not aware of the fact that I can get shredded wheat in a package like Plaintiff's Exhibit 21 now, containing the larger biscuit. I have not asked for it. I did not know I could get it.

I run a confectionery store, candy and baker's goods, bread. The restaurant feature is the dominant feature of it, the more important part. On our menu cards we do not carry any names. We make a list of our suggestions, cereal and coffee or grape nuts, something like that. We do not mention the gereal by name. We do not carry shredded wheat on our menu, no name of any of them. We have combinations, like toast, coffee, and fruit, or toast, coffee and cereals. When a customer takes it, he specifies what he wants. times he asks for shredded wheat and sometimes Whole Wheat, I guess. I pay no particular attention. Sometimes I wait on customers. No doubt they ask for shredded wheat sometimes. I fill such order with Kellogg's Whole Wheat Biscuit. I have nothing else. do not buy the Kellogg products in a combination case. I carry most all the Kellogg products, All-Bran, and Corn Flakes, individuals. I buy a case of each, the biscuit in one case, All-Bran in another, and Corn Flakes in another. I must have learned about Whole Wheat Biscuit through the Kellogg salesman. He is in my place every Monday morning. 'The National Biscuit man does not call on me at all.

RE-DIRECT EXAMINATION.

THE WITNESS: I never had any customers complain to me or through my girls when we served Kellogg's Whole Wheat Biscuit in the way I have described.

ALBERT T. TOMSKO.

Deposition taken at Pittsburgh, Pennsylvania, March 23, 1933.

DIRECT EXAMINATION.

The Witness: I am manager of the grocery market of Public Service Department Store, Cumberland, Maryland, a fairly good-sized department store, with this grocery department in it. There are larger stores in size in Cumberland. There is no other department store with a grocery department. The A. & P. Tea Company have an organization approximately the same size. I do not know their volume, aside from rumors. This is a large store. We are considered the largest individual grocery store in Cumberland.

The store is arranged as a self-serve market. Customers enter through a turnstile, pick up a basket. We have a shelf on each wall and tiers in the center. They go down the aisles, shop on both sides. Each unit item has a crayon mark. Cashiers add it up on the register, showing the total purchases, the customer pays, and the transaction is complete. They can buy a basket, or usually we have regular shopping bags and store bags, and the order goes there. If the order is large, they use an empty carton and take it out in their car. Usually there are no clerks to wait on them. It is a self-service proposition. They can go anywhere they wish. We try to train them to come in and go around to the right to relieve congestion. There

is no restriction, however; they can go anywhere they wish.

We handle Kellogg's Whole Wheat Biscuit, which is displayed the same as any other cereal. We also handle National shredded wheat biscuit. Shredded wheat has a better display in our store than Kellogg's biscuit. Kellogg's Whole Wheat Biscuit sells best by approximately three to one. At times the average has been higher. When the Kellogg Company had their house-to-house campaign on Whole Wheat Biscuit, I would say it was twenty to one, at least. That was a very outstanding week. I would attribute this large demand for Kellogg's Whole Wheat Biscuit to advertising, the house-to-house campaign. Until then, it was really just a shelf item. Some people did not know what it was. After the campaign, it was just the thing. They would come in and take it themselves. There was no one to serve it or wait on them. When the Kellogg's Company was doing this intensive campaigning, there was a decrease in the sales of National shredded wheat, a slight decrease, not much, because the sales of shredded wheat run rather uniform. think we noticed a very slight decrease in the sales.

I would say that, after the Kellogg Company came into the field, there was a stimulation of the business in shredded wheat, applying that term to both products. We did not have a falling off of twenty-eight cases in the week on shredded wheat. As soon as the Kellogg people had this house-to-house demonstration, my sales jumped from five cases to twenty-eight cases a week of Kellogg's biscuit, the week after that demonstration. We sold, in the week before the campaign three cases of Niagara shredded wheat, and about the same of Kellogg's biscuit; that is to say, six cases of the product, lumping the two together as shredded wheat. In the following week, when the campaign was

on, we sold about thirty-two cases of both shredded wheat and Kellogg's biscuit, about twenty-eight or nine of which were Kellogg's.

Our store is a hundred per cent. self-service, except the produce, which has to be weighed. Clerks weigh it, mark it, and put it in the counting basket. It is taken out and paid for in the usual manner. That is produce, like turnips, lettuce, apples, and potatoes, sold by the pound. You cannot expect the customer to do his own weighing. Clerks there do nothing but weigh it, mark it on the outside, after it is weighed and wrapped, and it goes in the shopping basket.

We get nine cents for shredded wheat and ten cents for Kellogg's Whole Wheat Biscuit. Those have been the permanent shelf prices since we had it. We have always established the same price of ten cents on Kellogg's, never had any other price. We handle other National Biscuit products besides shredded wheat, not the entire line, but some of their box goods and a few loose cakes. We have every item Kellogg's make, but not every size. We are cramped for space, so we handle practically everything they manufacture. The Kellogg breakfast foods are displayed with the cereals in our store. Kaffee Hag is in the coffee department.

In introducing a new product, we occasionally run a line item of an ad. We advertise every evening. We have only twice carried advertisements of Kellogg's Whole Wheat Biscuit that I know of, in the six months we have been in business. Kellogg's Whole Wheat Biscuit, physically, is similar to that. It is a regular whole wheat shredded biscuit.

Cross-Examination.

THE WITNESS: I call it so quickly a shredded biscuit, because I guess people are all used to calling

it shredded wheat and shredded biscuit. It is very similar. It is a natural thing, certainly, to call it shredded wheat. It has been known a long time to the public. I have known and always carried it in a package like Plaintiff's Exhibit 1, the old type package I have on my shelves today and have ever since we opened up, September 15th, a little better than six months. I had experience in the grocery line before that. I have been connected with the grocery business about four years.

We have Kellogg's Whole Wheat Biscuit in a package like this one, with the solid panels, which are stacked on our shelves where the customers can see them. I would judge Kellogg's biscuit are right in with Kellogg breakfast foods. We have their products all in with the breakfast foods. Kellogg's is at the end of the same counter here, where we stack it underneath. Shredded wheat is stacked at one end. When they turn the corner, they see shredded wheat from one end, from this side, and from that side; whereas Kellogg's is stacked in with the Kellogg products, so they have really only two ways to look at it.

Our store having been open six months, we have had both Kellogg's Whole Wheat and shredded wheat all that time, stacked as I have described it. Occasionally, new customers ask where the shredded wheat is or where Kellogg's biscuits are, or, occasionally, where something else may be. We do have that occasionally. They usually ask the cash girl. All she can say is: "Right up there." When we first started off, shredded wheat sales were a little ahead of Kellogg's for some time. Then the Kellogg Company did some campaigning. Every house got a sample. People would come in and say "I want a box of biscuit like the sample I received." My girls knew where the Kellogg package was. They stuck it in the news ads, also.

We posted our ads on a conspicuous bulletin there in the store. Our customers would ask the girls where they could find the biscuit of which they had received samples, and they were directed to the Kellogg display. At that time, in response to that campaign, the sales of Kellogg's biscuit had a great advance up to twenty-eight cases. I would say that was a temporary little wave of purchases for Kellogg's. In a length of time, it fell off to about three to one, and it has held its own something like three to one. That result was accomplished by this campaign of publicity and sampling. When they were selling twenty to one, the sales of shredded wheat went off slightly more, not much. There was a slight falling off in the sale. It would be fair to infer that that tended to indicate some users of shredded wheat were trying out Kellogg's biscuit. It is also fair to infer that some of them went back to shredded wheat, and some of them who had tried it did not care for it and did not repeat; otherwise, we would still have had that large demand for our Kellogg biscuit.

My store is not a member of the voluntary chain known as Plee-Zing Stores. We are wholly independent, not affiliated with any other store at all. We obtain our Kellogg supplies from the wholesaler, jobber. We get our National Biscuit Shredded Wheat from the National Biscuit Company agency. A salesman calls on us and keeps our stock up. We purchase a considerable quantity of National Biscuit Company goods in a month, have quite a sale of them.

DONALD C. DIETRICH.

Deposition taken at Pittsburgh, Pennsylvania, March 23, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am general manager of the Wheeling Wholesale Grocery Company, a retail owned wholesale grocery house. The group is classed as a voluntary chain. The stores are conducted under no particular name, just those of the individual owners. We have other accounts, aside from the voluntary chain, that we service. We have approximately three hundred-accounts, only about one hundred of which are stockholders of our organization. We have a cashand-carry department, also salesmen on the road. We cover a radius of about twenty-five miles in and around Wheeling. Our organization regularly carries. Kellogg's Whole Wheat Biscuit. There is a demand on us from our retailer customers for that product, a very much increasing demand.

We have practically eliminated the Niagara Falls shredded wheat from our stock, because we can make no arrangement whereby we get any profit by selling it, because the larger retailers are able to obtain as long discounts as we are. They can buy it about as cheap as we can. We would either have to charge them more for it or service it for nothing. They obtain the maximum discount, which is about seventeen and a half, the lowest discount we can obtain. In that event, we would be performing the wholesale service at a loss.

We sell Kellogg's Whole Wheat Biscuit to our retailer customers right along. I have never had any of them return that product to me and say it was not what they wanted, to my knowledge. I never knew of an instance of that kind. Recently, the price of Kellogg's biscuit has been reduced to where it can be goften into the ten-cent class, if the retailer and whole-saler are willing to work on a close margin of profit. We find that quite a number of retailers are asking for ten-cent shredded wheat, which means Kellogg's biscuit to me, because, to the best of my knowledge, the other product has never been marketed so it could be sold for ten cents. When we get such an order, we send out Kellogg's Whole Wheat Biscuit, and we never had any of it returned, to my knowledge. So far as I know, we never had any complaints about it, whatever. We sell it as and call it Kellogg's Whole Wheat Biscuit. We cannot stop a customer from saying Kellogg's shredded wheat, ten-cent shredded wheat, or something like that.

We have orders for it as Kellogg' Shredded wheat. Whether more or less of the orders come in for that or for Kellogg's Whole Wheat Biscuit is a pretty hard question to answer. The fact is that Kellogg's product has become pretty well known asshredded wheat among the retail trade. I personally cannot see much difference between the two products. It just seems that the retail trade think of it as shredded wheat, although I think they are getting away from that more and more all the time, because we are trying to sell the trade Kellogg's Whole Wheat Biscuit. We cannot keep them from asking for ten-cent shredded wheat or Kellogg's shredded wheat. demand for the Kellogg biscuit has been increasing very rapidly of late, because it has been put in the fairly respectable ten-cent class.

The price prevailing generally on the Niagara Shredded Wheat must be, I presume, fifteen cents or two for a quarter, or eleven cents at special sales. I do not know much about the retail prices of it, except what I see in walking around.

. Cross-Examination.

The Witness: I think the retailer thinks of the Kellogg biscuit as shredded wheat, because of the picture on the package there. It looks like the old shredded wheat I have known for a good while, the original shredded wheat, like the package, Plaintiff's Exhibit 1. I have known about that for many years, since I have been in the grocery business, thirteen years. In those years, I purchased and carried this item of shredded wheat, regularly purchased from the Shredded Wheat Company. In those days, shredded wheat was a very well-known product. It is quite natural that, with the knowledge of that product, having called it shredded wheat, a product looking like it with a picture like that on the outside would be called shredded wheat.

We feel the condition is probably getting about to a certain extent, where many grocers know the Kellogg biscuit is obtainable at a certain price and is known as ten-cent shredded wheat. It is a fact that the grocers ask for ten-cent shredded wheat. At the present time, they only mean Kellogg's shredded wheat, because that is the only one they can sell at ten cents. Shredded wheat is not regarded in the trade as a ten-cent item. When a grocer asks me for tencent shredded wheat, I know right away he means the Kellogg biscuit. I absolutely cannot keep him from asking for it that way or calling it shredded wheat. It is quite the usual thing for him to refer to it as Kellogg's shredded wheat.

I do not think our present stock has any National shredded wheat in it at all. It has not been very long since we cut it out. The last snipment of National biscuit was possibly ten cases. I know we can get the regular jobber's discount on it; but, to the best of my knowledge, the regular jobber's discount is no better

than the maximum retail, discount. The nameless group of steckholders in our organization are entitled to the seventeen and a half per cent. discount from the National. Individual retailers who can purchase a hundred or two hundred dollars worth of National Biscuit products every month do not also enjoy a maximum discount, unless they are members of a voluntary chain enjoying, as a whole, that discount. We have many retail dealers who can buy the National product just as cheap as we can. I am not sure whether . those retail customers are members of some voluntary At any rate, I know the National does sell shredded wheat direct, as it does its crackers, and distributes it direct to the retailer. I believe we put the Kellogg product in as soon as they brought it on the market. I was then carrying the line of Kellogg's cereals and just added this to the line. We feature it. advertise it, and push it in the hundred stores affiliated with us. We do not advertise shredded wheat. Limagine most of our stores buy at least some of the National Biscult Company products. We have no dealings with any biscuit company on behalf of any of our stores. We do not go into the cake and cracker business in any shape or form. The only reason they participate is because they own the wholesale house. It is a retailer-owned house. I came to Pittsburgh to testify, at the request of the Kellogg Company. I believe Mr. Anders said they would pay my expenses up here, but that does not amount to much.

FRED J. WALDINGER.

Deposition taken at Pittsburgh, Pennsylvania, March 23, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am branch manager of S. M. Flickinger, wholesale, and chain-store grocers. We

have our own affiliated chain of stores, and the Red & White Stores are a subsidiary of ours. We serve two chains, the Red & White and S. M. Flickinger, both co-operative chains. Flickinger Stores are co-operatively owned, and with the Red & White Stores, the manager owns all the stock. We have a contract with him, whereby we supply all merchandise to him.

I have been in the grocery business since 1900 and had my own organization at one time, under the name of F. J. Waldinger, which was merged, nine years ago, with the S. M. Flickinger Company. I am now in the wholesale end of the organization. I am a branch manager in charge of sales engineering. I do not manage stores. We have supervisors for that. My work covers both retail and wholesale.

Our organization carries Kellogg's Whole Wheat Biscuit. We did not put it in when it came out. It was a little while on the market before we put it in. As branch office at Buffalo, we are not permitted to buy anything new, unless we have sufficient demand. In this particular case, quite a number of them have demanded Kellogg's Whole Wheat Biscuit, from our branch stores. We put it in after that demand became insistent enough, and we have continued carrying it ever since. It sells right along.

We also handle National shredded wheat. Without checking up, I cannot say, but the sales of those two products are about fifty-fifty, pretty close to it.

There is much manufacturer's stimulation behind the Kellogg product in our market. We have had coupons giving a package with a package, then a chart wheel at one time, given with two packages; and the sampling I referred to, they buying a package and we giving them a package. There have been store and window displays.

Besides the two voluntary chains, we still service some old-line retailers. We have a Kellogg campaign we are starting now, where we let each store send in fifty names. The Kellogg Company sends in a card telling them to go to the store and buy a package of biscuit and they will get one free. We just started that a short while ago. The names are not all in. I know about the selling conditions in retail stores. I do not know of any instance in which a package has been sent back by any dissatisfied customer who said she wanted the other. I get to the stores but not back of the counters. I could not tell you how they call for these products. Physically our orders are all warehouse orders, written out, usually marked Kellogg's Whole Wheat Biscuit, and come to our warehouse to be filled. I have had no confusion. No retailers have sent any back and said they wanted the other, to my knowledge.

As far as I know, all the stores of our organization carry both products. They are arranged, as nearly as possible, on the same type of plan.

CROSS-EXAMINATION.

The Witness: The sales of the two products are about fifty-fifty, very little difference between them. That has been the case for a few years. I think we stocked Kellogg's just about two years ago in our branch. I do not think the Kellogg biscuit sale has been growing at the expense of shredded wheat. I think we probably sold more shredded wheat than we did Kellogg's biscuit, for a while. I would not say that Kellogg's biscuit then overtook it. I would be, I would say, pretty close to an even break. Kellogg's Whole Wheat started from scratch, with a redded wheat sales ahead, and the Kellogg product pulled up to a fifty-fifty break. It is a hard question for me to answer whether it was at the expense of shredded wheat. I would not say so.

I could only answer whether shredded wheat sales have fallen off for that year by checking my books.

Since shredded wheat has been handled through the National, we get them in smaller amounts. We used to buy a hundred cases in a pool car. When Mr. Walker here had an account, we used to make a pool car. We would be only buying fifteen cases at a time, as we needed it. We handle it through the warehouse. I am not prepared to say how much shredded wheat I purchase in a year. If you say a little over a thousand cases, at \$4.05 a case for the year, that sounds reasonable. I believe Kellogg's would also run close to a thousand cases. I would say shredded wheat in past years has run more than a thousand cases. It has diminished since the Kellogg product came on the market.

As early as 1900 I did not know shredded wheat, I believe, I must have known it since it has been out. I could not tell you how many years. I would say off-hand twenty years. I could not answer as to thirty years or more. I have not visited the factory at Niagara Falls. If it has been out thirty years, I have known it that long. Perhaps I sold it thirty years ago. It has always been known as shredded wheat, and it is a very well-known article. It is known pretty generally throughout the country among the public, due to extensive advertising given it when it was new. I know there has been a lot of money spent on shredded wheat.

In our organization, we never, to my knowledge, make the mistake of calling Whole Wheat Biscuit shredded wheat. If you would go into another store and call it that way, I would not know about that. So far as our store is concerned, there are two separate products. We sell very close to an equal quantity of each product at the present time. We make a little more on the Kellogg biscuit than we do on shredded wheat. That helps us push it. A merchant will push the product he makes the best profit on.

JOSEPH FRANCIS MAGA.

Deposition taken at Pittsburgh, Pennsylvama, March 23, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am steward and purchasing agent of the Schenley Hotel. I have been in the hotel business eleven years, ten years with the Schenley. We run a grill room, dining-room, and room service. We carry cereals, including Kellogg's Whole Wheat Bistuit in the individual cartons like Defendant's Exhibit 80.

We carried Niagara shredded wheat in the small individual carton, but I discontinued that when I put the Kellogg biscuit in. That is, when I put the Kellogg product in, I discontinued handling the large carton of Niagara Falls and put in the small carton. I have both kinds. When they are served in the Schenley Hotel, they are served inside the carton. The carton goes to the consumer. I could not tell you how the consumers order them, because I do not take the order. The cereal is left on the tray. I would not know of any complaints or send-backs. Of cereals, corn flakes sells most in our hotel. Of these two biscuit, Kellogg's outsells the Niagara biscuit.

Cross-Examination.

The Witness: We get twenty-five cents a service for either shredded wheat or Kellogg's Whole Wheat Biscuit. I think Kellogg's costs us about ninety-five cents a case. I think there is a little difference in favor of Kellogg's. We carried shredded wheat a whole lot longer than the Kellogg product. We have had it for years. I happened to get the Kellogg biscuit started by being visited by Kellogg salesmen. It was the smaller package. After I took on Kellogg's biscuit, I took on the smaller package of shredded wheat, also.

I do not know whether our customers call for shredded wheat. The waiter takes the order.

On the menu card, Kellogg's are specified, as Kellogg's Corn Flakes or Whole Wheat Biscuits. We do not specify the Kellogg's. Post Bran, Whole Wheat Biscuit, Post Bran Flakes, and Kellogg's Whole Bran; each item is specified. We specify them by name, so they know what they are getting. We just put down Whole Wheat Biscuit-not Kellogg's. I guess the reason I leave that out is the size of the menu. They use up too much space. Kellogg's Whole Wheat Biscuit has been outselling shredded wheat for probably the last six months. That is just my rough impression of the amount of our sales. I have not consulted my books at all. I would not say I sell less shredded wheat than I did before Kellogg's Whole Wheat Biscuit came on the market, because I think I sell just as much shredded wheat. Right now, all that cereal business has fallen off. I purchase my Kellogg supplies in singlecase lots of each article, not assorted.

MORRIS MELMAN.

Deposition taken at Pittsburgh, Pennsylvania, March 23, 1933.

DIRECT EXAMINATION

THE WITNESS: I handle a grocery for my dad, Melman's, at 924 Brookline Boulevard, Pittsburgh. We are not connected with any other stores. The store is associated with a voluntary chain, Triangle Grocers. It is part full service and part self-service. We take quite a few telephone orders, extend a little credit, and make free deliveries all the time.

We handle Kellogg's Whole Wheat Biscuit, for which there is a consumer demand in our store. That is why I got it in the first place, to meet calls we had. Several women asked me specifically for that one product. While I felt a little reluctant at first to be taking on a new item, I did it for their convenience. I have had demands for it ever since. There have been many new customers on that item since that time. They seem to like the shape of it and the fact that it is convenient and not so large.

I handle National shredded wheat, which outsells the Kellogg biscuit about two to one. The demand for Kellogg's biscuit is an increasing and growing demand, I believe. I think the demand for the National shred-

ded wheat has fallen off somewhat.

When they want the National biscuit, they say, "Give me a package of shredded wheat." When they want the other, they say, "Give me a package of Kellogg's Whole Wheat Biscuit"—or: whole wheat biscuit. There is no confusion in our store between the two. I know what the customer wants, and I give it to her. She gets what she wants all the time in my store. I cannot say that I have had any customers return one saying they wanted the other. The cereals are up on my top shelves. I have had window displays and inside store displays of both products.

Kellogg's biscuit has by far the most active support from the manufacturer behind it of the two. The Kellogg salesmen have, from time to time, put up inside displays, especially displays like Defendant's Exhibit 83 on the top of a partition which separates my back from the store proper; also several window displays. I generally have a group of allied articles in my window, rather than concentrate on one. There are no National representatives by any means as active as the Kellogg ten, in pushing shredded wheat. I have asked customers from time to time if they have tried the Kellogg biscuit. When I have an inside display, I open a package and show it, just as I would push any other article I had a special on. My method of introducing a new product to the attention of my cus-

tomers is to build a display and push it. Last week, I had a new article, a fruit cocktail, had a big inside display, pushing it, suggesting it, selling it. I try to bring a new article to the attention of as many people as I possibly can, depending on our stock. We never substitute. We give the customer what she asks for. If we do not have it, I tell her I am out and ask if she would care for something else, which it of regarded as substitution. What we regard as substitution is when she asks for something and we give her another product without saying anything, which I could easily do, because I get many telephone calls in the store. Whenever I am low on a particular item, I always make it a point to ask the party on the telephone to wait until I am sure I have it.

We advertise. I have advertised Kellogg's Whole Wheat Biscuit several times during the past year. I believe I have advertised shredded wheat about as many times. When I advertise, I tie up with some display connected with the ad. It does not pay to advertise if we do not back it up with display.

I handle quite a few of the National Biscuit line of crackers and some of their loose cakes. I have not for a long time tarried the National line, but, the past year of so, I carry them. When I discontinued them, I did not get as big a discount as I believed I should. For that reason, naturally, I did not care to handle the line.

I never had any thredding machines in my place. I have seen them, though, little miniature machines, in a window in a town, probably in a restaurant. They seemed to shred them up and lay biscuit out. I believe they were always machines of the shredded wheat. They were little shredding machines, showing the kernels of wheat and the way they were ground or shredded. Personally, I prefer Kellogg's Whole Wheat Biscuit. I believe it is baked a little better. The regular shredded wheat tastes just a little raw to me. I prefer Kellogg's because it is baked on both sides.

CROSS-EXAMINATION.

The Witness: I am enjoying, as a member of the Triangle stores, the National discount now. I have been carrying their crackers as well as shredded wheat. I get my shredded wheat from the National man. I have no set opinion as to why sales of shredded wheat are falling off. To my view, one woman may tell another about the small whole wheat biscuits she got. Kenogg may be getting some of it. The product is similar and can be sold for the same purpose. I have been in the grocery business about five or six years. I used to buy my shredded wheat from the shredded wheat company, through a jobber. I have known the article like Plaintiff's Exhibit 1 a long time. It has always been a good and fairly steady seller.

It is not particularly difficult to introduce a product like Kellogg's Whole Wheat Biscuit, in view of the fact that the public is already familiar with shredded wheat. It is not like a brand-new product the public had never seen. They are fairly familiar with it. Kellogg's biscuit are slightly different. My customers do not call for Kellogg's shredded wheat, ever, I believe. Three or four customers I can state offhand positively ask for Whole Wheat Biscuit. I do not remember exactly what some of the others say. When they call for Kellogg's shredded wheat, when something like that happens, I generally ask them what they mean, whether they want shredded wheat or Kellogg's Whole Wheat. In my experience, I have known them, when they wanted shredded wheat, to ask for it by that name. If they asked for Kellogg's shredded wheat, I would not think they might be confused regarding it. Offhand, I would think they might be asking for Kellogg's Whole Wheat Biscuit. There might be some confusion. For that reason, I always ask them what they want. I keep both products side by side in the store.

HARRY FARBER.

Deposition taken at Pittsburgh, Pennsylvania, March 23, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer, Clover Farm store. Orders come in by telephone and people come in. We make deliveries, and we extend credit to a few. Our store is arranged so customers can serve themselves.

We carry Kellogg's Whole Wheat Biscuit and have carried it since it has come out, close to two years. There is very much of a consumer demand for that product in our store. One of the Kellogg salesmen came around and sold it to me. I had had a few calls for it before. They asked for Whole Wheat Biscuit.

I also handle Niagara Falls shredded wheat, like Plaintiff's Exhibit 1, and I have handled that for some years, since I opened up. Of the two, I sell the most of Kellogg's Whole Wheat, about ten to three. I get a case of Kellogg's every week, and I buy a half case of shredded wheat every other week or once in three weeks. I got a case yesterday, which will last me a good while. I buy shredded wheat now from the National. I used to buy it from Fox. We try to sell everything. When a woman comes in and asks for shredded wheat, I just give her shredded wheat. I do not try to give her Kellogg's or anything else. I have given window and store displays to Kellogg's biscuit but never gave any displays to the National shredded wheat.

Some kind of chart was given away with Kellogg's Whole Wheat Biscuit and they have some kind of animal pictures given away with them now, fastened on the packages with a rubber band. I have the two products stacked right up there. If they ask for shredded wheat, I just give them the National shredded wheat. They call for the Kallogg product as Whole Wheat Biscuit.

If a customer asked me for Kellogg's shredded wheat, I do not know what I would do, because they do not call it that. They call it Whole Wheat Riscuit. I have had no confusion between those products. Some of my people like shredded wheat and I give it to them. Some want Whole Wheat Biscuit, and I give them that. Customers never sent it back and say they ordered the other one.

Of the National line I buy only shredded wheat. I had a hundred per cent. National line two years ago. In Lent, I needed oyster crackers. A salesman came around every Tuesday. He never had them for me, always told me he was out. I live a half mile away from a grocer and I had to send a kid up to buy me half a dozen oyster crackers at the A. & P. They always had it. That is why I quit them. I asked Sunshine, they sent me oyster crackers, and I give them all my business. The National Biscuit man has come in the last couple of weeks. For two years he did not stop. I told him he should not, that I would not give him my business on account of the oyster crackers.

The Kellogg man gets around once in three or four months. I permit the Kellogg selesmen to put up store displays if they are small enough. I order Kellogg's biscuit through the Fox Grocery in Charleroi. I send in an order every week. The consumer demand for Kellogg's biscuit is growing up pretty well since I first started it. I did not sell much at first but now I sell quite a bit.

CROSS-EXAMINATION.

THE WITNESS: I still sell about a dozen shredded wheat a week or so. I think I sell less than I did before the Kellogg biscuit came. I cannot tell you exactly. I have handled shredded wheat all the time. I used to pick it up from the cash-and-carry wholesaler down there. I have been in business since three years next

July. I had not been in the grocery business before. I have handled shredded wheat since I was in business.

I have been a Clover Farm store since a year in April. Fox is the jobber I buy from. I first heard of Kellogg's biscuit through a little fellow, a Kellogg salesman who came around and sold me some. I never bought it from Fox until I joined the Clover Farms. I bought it down town.

The Fox people advertise Kellogg biscuit for me, and we push it. We push everything. If you belong to an organization, you want to put it over. I am an organization man now, and I co-operate with the Fox people and Clover Farm. I do not know if I make more money on Kellogg's or not. I sell shredded wheat for twelve cents and Whole Wheat for ten, used to be eleven. A lot of people like it because it is shorter cakes than shredded wheat. I guess a lot of people use it now who used to use shredded wheat. It must be so, I guess, if they are comparing it with shredded wheat biscuit.

RE-DIRECT EXAMINATION.

THE WITNESS: I recently furnished a list of fifty names to the Kellogg Company, for them to send out coupons to have them buy one and we will give them one, on Whole Wheat Biscuit.

B. BLAINE FOX.

Deposition taken at Pittsburgh, Pennsylvania, March 23, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a wholesale grocer, Fox Grocery Company, having affiliated with it a hundred and fifty-four Clover Farm Stores, located in Washington, Fayette, Westmoreland, and Greene Counties, a few in

Allegheny County. In addition, we have other accounts, a total of three hundred altogether. We have salesmen traveling the trade.

We have a very definite, substantial, increasing demand from retailers in our organization for Kellogg's Whole Wheat Biscuit. The business has been growing. Substantially all our accounts buy their products from us, in our group of stores. We also sell to outside accounts. All the Clover Farm Stores carry Kellogg's Whole Wheat Biscuit. Some of them carry National Shredded Wheat. I would estimate not more than twenty-five per cent. of them carry both products. A hundred per cent. of them carry the Kellogg product. Those stores feature and push the sale of the Kellogg. biscuit, by advertising and running special sales, coupling the ads up with special features, such as window and store displays, and special exhibits furnished by the Kellogg Company. The stores also use the tie-up packages, with Jangle Land Books or Wheels of Knowledge. Lists are being prepared at the present time of names to send out postal-card coupons, entitling the recipient to buy one package Whole Wheat Biscuit and get one free. The Kellogg Company salesmen are very active in promoting the sale of the Whole Wheat Biscuit in our stores. We have nothing like that activity from salesmen of the National Biscuit Company regarding shredded wheat. They are mostly cake and cracker men.

I have had plenty of discount discussions with the National Biscuit Company. At the time we organized a group of affiliated stores, as they were selling National Biscuit crackers and cookies, we were anxious to make what we called an associated hook-up. We felt our Clover Farm Stores should be entitled to discounts as much as the corporation chain. They refused to give it to us. After three attempts, we made connection with another cracker concern, very satisfactory. The

National refused to treat with our stores as if they were a chain-store organization. Their last statement was we would work with them as individual merchants, not as a group.

To my knowledge, our organization is not, at present, getting a larger wholesale discount from National than some of our retailers can get. I think the discounts are the same.

Our stores take any item they feel is going to be a success. They are anxious to handle it in the stores as soon as possible after it is put on the market. At the time it was introduced, Kellogg's Whole Wheat Biscuit gave the trade something new, by which they could put new light in their cereal business. The success the stores have had would justify the amount of work they put on it.

The retail purchases of the two products run uniform. They are about the same. I do not know whether retailers make a better profit on Kellogg's biscuit. As wholesale grocers, we make more on it than we could on shredded wheat. Shredded wheat is not a very active item in our wholesale house now.

Cross-Examination.

THE WITNESS: I am the head of the entire country-wide Clover Farm organization. I am their president, not their active head. I have some responsibility. I think we have stores in something like twenty-five states. I do not know the number of retail outlets, but it is very large. The parent organization parcels out different territories or places in the nature of a charter or license, each group centered around some wholesale grocer who acts as sponsor for that group. We feel the organization is quite powerful and is a good organization. We have a pretty tight hold on our members by way of inducing them to follow our advice, more in the nature of each individual wholesaler. I would say,

however, that the scheme does compel a rather complete control over the individual units, as far as that is compatible with their individual ownership. We try to have our business operated in such a way they are glad to be loyal; but we point out to them it is to their interest to follow our instructions.

We were unable to deal with National and came to terms with Loose Wiles. We recommended our retail outlets to tie up to Loose Wiles. We recommended that the retail unit make their own decisions on a matter of that kind. They do not at all times decide what we recommend, but they do pretty generally. I cannot recall any places where the National was able to get into some retail units. What I meant to imply was this: When it comes down to a decision on a hook-np, that decision must be made by a retailer Board of Control, elected from the membership to represent the group as a whole. A decision made by a majority of that board will go before the entire membership. The board will sell the idea to the membership. If it is voted by a majority vote, that is the decision, and it is pretty likely to be adhered to. It is being adhered to. A retailer who dissents and hooks up in another way is not very popular with our organization. At present the National does not stand very well with Clover Farms in the Charleroi Division. I cannot speak for the organization nationally. We do purchase shredded wheat from the National, part of which is distributed through our own organization. I know by this time that the National does recognize organizations such as ours for discounts. decision came too late for me.

I have been in the grocery business about twentysix years. I knew shredded wheat for many, many years. It was a well-known and well-advertised product. I do not remember when it was introduced, that far back; but I do know the Shredded Wheat Com-

pany spent a lot of money making it a popular cereal. It was on the market long enough for them to spend it. I do not know much about what they would spend on the product in the early days. I know it was a very popular and well-known product, whatever means may have been adopted to make it so. A somewhat similar product that came out was Muffetts, which is still on the market. It did not resemble shredded wheat closely in the package, but in substance to some extent. appearance of the round biscuit was not the same. Until Kellogg's biscuit came on the market there was nothing really like shredded wheat, except possibly Muffetts. I do not know enough by contact with the consumer to say whether, with Kellogg's biscuit; we are able to do without shredded wheat to a large extent. If they all felt just the way I do. I am sure they could get along without it. I am sure that Kellogg's biscuit could take its place very successfully. Only about 25 per cent. by my estimate of the membership in our unit carry shredded wheat. All of them have Kellogg's Whole Wheat, which is featured in the general advertising, something our Board of Control has decided shall be carried by the members. They have made no pronouncement regarding shredded wheat. · The National Biscuit Company's salesman would not stand very much show with our retail dealers if he wanted to go in and stage a demonstration. He would not have a chance. The old sore has not healed.

RE-DIRECT EXAMINATION.

The Witness: Shredded wheat never was the leading dry cereal. It was never the biggest selling dry oereal. It was a small seller in comparison to Corn Flakes and things like that. That was always the case. In the last fifteen or eighteen years, the sale of shredded wheat was very limited, I would say. It never was in the front rank of the big selling cereals.

RE-CROSS-EXAMINATION.

THE WITNESS: I would think shredded wheat would be very strong in the class of cereals featuring the use of whole wheat. It was one of the leaders in whole wheat. It is not in our territory a leader of the whole wheat cereals, but that does not mean that is so everywhere. I never did carry the National Biscuit cookies or crackers at all.

RE-DIRECT EXAMINATION.

THE WITNESS: As far as I know, there was no other shredded wheat besides National shredded wheat before Muffetts came on the market. In those days it sort of led itself. It was by itself. It has always outsold Muffetts. At one time Muffetts was selling our territory. Then the advertising was cut out and effort ceased. These businesses do not move along by themselves when advertising is stopped.

MRS. ADA WHITE.

Deposition taken at Pittsburgh, Pennsylvania, March 23, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife with a husband and two children, four in the family. I use Kellogg's Whole Wheat Biscnit and have used it about three months. I first became acquainted with it through a sample at the door. I tried it, liked it, and have continued to use it since.

I have occasionally used the other product, Niagara Falls shredded wheat, like Plaintiff's Exhibit 1. I was not a great user of that, because it was always broken, and not toasted just right. The children did not seem to like it. We do like Kellogg's Whole Wheat Biscuit, the size, small, and the flavor. The children like it very much. When I order it, I ask for Kellogg's Whole Wheat Biscuit. I never asked for it and got another product. I went to one store and did not get it. They do not handle it. I went to another store at East Liberty and got it. I continue to get it at this other store.

CROSS-EXAMINATION.

THE WITNESS: I used to buy shredded wheat occasionally and have known about it for a good while. It has been very well known and on the market for a long time. We were not very regular users of it. We always had a box in the house, and it lasted a long time. I have had it as long as I have been keeping house, about seventeen years. There was always some in the house, although it was not used very fast.

I got a sample of Kellogg's Whole Wheat Biscuit a few months ago and thought I liked it better than shredded wheat. Since then I have been converted to Kellogg's Whole Wheat Biscuit. I serve it in my home by putting boiling water on it. The children like it that way. Sometimes I put cream and sugar and a banana on it. I put it on the table in a dish. My husband and all of us eat it. We use more of the Whole Wheat than we used to use of shredded wheat.

MRS. JULIET V. MEYERS.

Deposition taken at Pittsburgh, Pennsylvania, March 23, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, with three in the household. I use Kellogg's Whole Wheat Biscuit and have peed it about two years, I think. They called my attention to it first in the grocery store where I trade. I bought some of it, liked it very much and have used it ever since. I like the size of the biscuit and the way it is toasted.

I have used National shredded wheat, which is a larger biscuit. I do not see how they could be mixed up. I never did. I never mixed the packages in any way. I used the National biscuit a long time before I began using Kellogg's, because I did not use them all the time. In the winter I would use a cooked cereal. I was not as frequent a user of the National biscuit as I have since been of Kellogg's biscuit. I like the double toasting. I do not know any of the Kellogg people. They got my name through the grocer. Grocers sometimes tell me about new products when they put them in. They call our attention to different things. My grocer never substitutes one thing when I call for another. They never have asked me to take any substitute. If I order one product, they do not send me another without any explanation.

CROSS-EXAMINATION.

showed me Kellogg's Whole Wheat Biscuit. I trade there regularly. I do not think I was looking for shredded wheat at that time especially, because I usually get things like that once a week. When I order shredded wheat, I get it. I had not mentioned shredded wheat that particular day when he called my attention to Kellogg's biscuit. 'He asked me to try it, and I liked the size of the biscuit. He did not open the package and show me the biscuit. I saw them. I could pretty nearly tell. I asked him if they were smaller. I noticed the box was a different type. I used to use shredded wheat every week or so in Buffalo. I have been by the factory, but I never went in. I recognize

the package, Plaintiff's Exhibit 1. I knew about it for many years and had probably never been without it, because, as I say, I did not use it in the winter. When my daughter was little, I used cooked cereals; but, in the warmer weather, I did buy shredded wheat. It was a very well-known product. I never had seen anything else like it up to the time I bought Kellogg's biscuit, because I did not know there was any other. When I found I could get Kellogg's, that supplanted shredded wheat in my pantry.

RE-DIRECT EXAMINATION.

THE WITNESS: The other two members of my family like Kellogg's, also. When I order it, I ask for Kellogg's Whole Wheat.

MRS. W. CLOTWORTHY.

Deposition taken at Pittsburgh, Pennsylvania, March 23, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, with a son and daughter, just the three of us. I am a user of Kellogg's Whole Wheat Biscuit. I think I have used it almost since it came out, about two years. The grocery man had it on the counter. I saw it was a nice size, ordered a box, and have been using it ever since.

I have used Niagara shredded wheat a great many years. My husband has been dead four years last November. He was alive when I used shredded wheat. He liked it and used it, but he has not been alive since this was out. The children and I like it because of the size and the way it is baked. We have continued to use Kellogg's biscuit. We do not buy any shredded wheat. I just go up to the store and ask for a box of Kellogg's wheat biscuit. I have never had any other product handed me when I asked for that.

CROSS-EXAMINATION.

THE WITNESS: I have used shredded wheat, like Plaintiff's Exhibit 1, a good many years. The only fault I find with it is they do not bake it enough to suit me. I have been married twenty years. I have not used shredded wheat all that time. My husband used it when he was living. I serve it with fruit. We do not like it with hot water over it. I bring it on the table in a dish. I handle Kellogg's biscuff the same way.

Up to the time my grocer showed me Kellogg's biscuit, I had not used any other product of the kind except shredded wheat. I do not believe there was anything on the market before. I had always known it as shredded wheat. My grocer is Mr. Snyder. He showed me Kellogg's biscuit first. I was not then looking for shredded wheat. I just went up to the store and saw this package. I did not open it for a day or so after. I was not in the market for shredded wheat at that particular time. I saw this and thought I might like it and took it home. I have used them since then. Since that time Kellogg's biscuit has taken the place of shredded wheat in our household. We like the size of it. I came to testify here because Mr. Snyder, I think, recommended me as a buyer. I presume he gave my name to the salesman. He came to see if I would · come down, the Kellogg salesman, because I said I was a good user of it.

MRS. MARGARET VAUGHN.

Deposition taken at Pittsburgh, Pennsylvania, March 23, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, with a husband and four children. We are all consumers of Kellogg's

Whole Wheat Biscuit and have been since they were first in Brookline. I know them as Kellogg's wheat biscuit, because I am so used to that name from seeing it for years and years, I have never thought of anything else. I have used the other biscuit, like Plaintiff's Exhibit 1, a couple of times, but I did not seem to care so much about it, because of the rawness of the biscuit. I like Kellogg's biscuit because it has a different flavor altogether. It is cooked or toasted so much better than the other biscuit. I like everything about it. I have continued to use it and more than I did the other. I do not believe I used two boxes of shredded wheat. But I use two boxes every few days of the other. My family like it.

I happened to come here today because Mr. Melman, our grocer, asked me if I would care to. I said yes, because I like the biscuits so well.

The day I first became acquainted with Kellogg's biscuit, I happened to be in Mr. Melman's store. I generally try new breakfast food he might get in. I was undecided one day what to get. He asked me if I had tried this particular kind. I said, "No, I did not know Kellogg's were making whole wheat biscuits." He said he just got them in. I have been buying them ever since, almost two years ago now.

CROSS-EXAMINATION.

The Witness: I never used much shredded wheat. I have known about it, however, for several years. It is a well-known product. I never bought it except just once or twice. I was not looking for shredded wheat when I went to Melman's two years ago. I was looking for some cereal. I have most kinds. This was different. He asked me if I had tried it. I said no, that I would, and I did. He did not say anything about Kellogg making a shredded wheat biscuit. It is safe to say

that, from then on, I did not get shredded wheat biscuit at the store. They came around to get me to buy one box and they would give me one free, but I did not get it. I did not use those. That is the reason I do not use it today. I did not know shredded wheat until I started to use the Kellogg biscuit, which I liked very nach and have continued to use.

MRS. ELIZABETH AMANN.

Deposition taken at Pittsburgh, Pennsylvania, March 23, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, and I help in my husband's business, a hardware store. Usually, there are just my husband and I in the family, except when my children come home with the grandchildren. They come occasionally and stay for a week or so.

We are consumers in our home of Kellogg's Whole Wheat Biscuit. I think just as soon as it came out, we had it. That has been several months, I guess about three months. I first became acquainted with it when I went to the little store at the corner, where Mr. Walsh used to be. I asked for shredded wheat biscuit, which I had gotten there before. He said he had something new, Kellogg's wheat biscuit. I said I would try it. He said there were fifteen biscuit in the box. I said I would try it. I went into Walsh's grocer and asked for Kellogg's biscuit. He said he never heard of it. I said, "They are just wonderful." He said he would have to get them in, and the next time he told me he had my wheat biscuit. I have never had any trouble getting Kellogg's Whole Wheat Biscuit. I like them very much, and better than shredded wheat biscuits, because my husband and I like something hot in winter weather. I make Postum and pour some of the hot water on the biscuit, and pour it off into my postum. It leaves it nice but not too much. If it were a second too long on the National shredded wheat, it would leave it kind of mushy, and it would get you sick at the stomach, but not Kellogg's. It still leaves it solid so you want to chew it.

I prefer to use Kellogg's Whole Wheat Biscuit, and so do my grandchildren. I used to give them shredded wheat. They would tell me not to put too much hot water on. Since I have Kellogg's, they always ask for it. They like it much better. When they go back home, they ask their aunt to get them the kind grandma has.

A man came there and asked me what I thought about it. He got my name from Mr. Walsh, the grocer. I had never seen him before he came to the door.

CROSS-EXAMINATION.

THE WITNESS: I had known shredded wheat biscuit a great many years. I have even been into the factory sometimes at Niagara Falls. I had known it. It is a very well known product. We had used it up to the time we saw the Kellogg biscuit. I was shopping for it when I went into the store, but I used more Rolled Oats when I used it. We got tired of it. I was going to the grocer to get shredded wheat and asked him for it. He called my attention to Kellogg's Whole Wheat Biscuit, said they were a new kind. I said I would try it, and since then I used it instead of Shredded Wheat. I have not used anything else besides Rolled Oats.

MRS. LORETT SPRATT.

Deposition taken at Pittsburgh, Pennsylvania, March 23, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am married, have a child, and live with my husband's people. There are nine in the house-

hold. I use Kellogg's Whole Wheat Biscuit. I first became acquainted with it when mother brought it into the house before I was married. Afterwards, I introduced it to my husband's family. They had known about it but had never cared about it before I brought it in and they ate it. They tried National shredded wheat, but they have not been using it since I came. They have been using Kellogg's Whole Wheat. They like it because it is browner, and they like the small size of the biscuit.

CROSS-EXAMINATION.

The Witness: My mother got it at home. I do not know when. I have been familiar with shredded wheat, like Plaintiff's Exhibit 1. I know that package and had them in the house as long as I can remember, up to the time mother got Kellogg's shredded wheat. After that, we started to use Kellogg's biscuit. I do not know how that all came about. When I was married and went to live with my husband's people, I carried Kellogg's biscuit along with me.

DAVID K. KASBARIAN.

Deposition taken at Boston, Massachusetts, March 28, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a grocer and market man, with a service store with a full line of groceries, meats, and vegetables, at 422 Broadway, Cambridge, Massachusetts. We wait on customers. Most of them, when I am busy, come in and look over the shelves, sometimes pick up a few things. Their custom of waiting on themselves is growing in the grocery trade. We have quite a few telephone orders and extend some credit.

I handle Kellogg's Whole Wheat Biscuit and have had it about three years. There is a consumer demand for it in my store. They ask for it as Whole Wheat Biscuit or Kellogg's Whole Wheat Biscuit. Sometimes they mention it as Kellogg's shredded wheat and sometimes Whole Wheat Biscuits, mostly the latter. If I have an order for Kellogg's shredded wheat, I tell them I do not have it, that I have Kellogg's Whole Wheat Biscuit. I tell her that is the only thing I carry. If she wants shredded wheat biscuit, I tell her where she can get it.

I did have Niagara Falls shredded wheat for years. I have been in the store thirteen years and had it always until Kellogg's biscuit came out, and I had so big a sale on Kellogg's biscuit, and had floor and window displays, to start with, and it started to boom. People tried it and repeated on it. I carried both kinds until a year or a year and a half ago. I discontinued shredded wheat, because it was left in my store and I tried to get rid of it. It spoiled. I reported that to the company and they did not make good for it. I figured that, if I was making a few cents on it and the company could not stand back of it, it was a loss to me. Why should I do it?

Since then, if a customer asks me for shredded wheat, I tell them I have Kellogg's Whole Wheat Biscuit. If they do not want it, I tell them they can get shredded wheat at the First National Bank Building. I let them walk out. I have probably two or three customers who ask for shredded wheat. I do not try to insist on their buying it, because I do not carry it. I have some months one case and some months two cases of Kellogg's Whole Wheat Biscuit. The first thing I did to help introduce the Kellogg biscuit was one of the salesmen put in a window display for me. They gave me green measuring cups. I put one with each package, and people tried it. I had it on the floor and on

the shelf. They took it home and they have since been asking for Whole Wheat Biscuit.

I have never had any confusion in my store between Kellogg's biscuit and Niagara Falls shredded wheat. I cannot remember any customer returning one product and saying they wanted the other. I handle the entire Kellogg line, for which there is always a consumer demand.

We have First United advertising. Most of those items come under circulars, on or off. Kellogg's Whole Wheat Biscuit has been advertised that way on and off in the season. It is a summer product, generally featured in the season. The consumer demand for Whole Wheat Biscuit holds up pretty well. It started slowly and has grown. I do not miss shredded wheat at all. When people ask for it and I say I do not carry it, some try Whole Wheat Biscuit and some walk out. Those that try it mostly repeat on it.

I do not practice substitution in my store. I do not believe in it. I would rather give customers what they ask for. If I do not have the product, I suggest what I have. If they like it, all right. I do not insist they buy it. I believe in satisfying the neighborhood trade. I would not be there for thirteen years if I did not. I have seen markets open up alongside me and close up in a year.

Sometimes we get Kellogg products from their salesman coming to the store. Other times, we get them from warehouses on some special. They always carry Kellogg's biscuit in stock, and we get them right over.

I handle some Uneeda Biscuit of National, and a few different things, on and off. The National Biscuit salesman comes in and gets the order. We get the seventeen and a half per cent. discount through the office, from both National and Sunshine. I do not believe the chain stores in this territory advertise shredded wheat at a cut price. It is not exactly a cut-price item. They do not slash it so you cannot make a cent on it. I sell Kellogg's Whole Wheat Biscuit at eleven cents, the same price I used to sell shredded wheat for. I would make a profit on either of them at that rate, if I were handling both.

I think the Kellogg Company do sampling on Whole Wheat Biscuit. They always sample from house to house on the full line, almost every season. They leave generous order samples in the store for us to pass out to the trade. Those things help. We have had no Saturday sales in our store for a year or more. I used to print my own circulars and send them out. I had only one or two measuring cup deals. I bought so much I would put the stuff up, and it went so fast in stock, I had to repeat the order right away.

CROSS-EXAMINATION.

THE WITNESS: This is my first and only store. I have been thirteen years in the business. When customers ask for shredded wheat, I know what they mean, a package like Plaintiff's Exhibit 1. I know it now a long time. When I was first in business, that is the only product of that kind I knew, I am sure. I carried it in stock and sold it regularly, always. There was always a regular demand for it. Two years ago, when I put in the Kellogg biscuit, the Kellogg people made considerable efforts to introduce it, gave me floor displays, window displays, and had their own advertising outside. I think they sampled the biscuit in our neighborhood two or three times. When they sample house to house, they leave generous samples with us for our orders. I think they have done that with Whole Wheat Biscuit. The sample was a small package with either two or three biscuit. Then there began

to be a demand for Kellogg's biscuit, and there was also a slowing down of the demand for shredded wheat at that time. That fell off. We have a standing business, family trade coming in. Year in and year out I was in the same neighborhood. Lots of them stay. They are not buying shredded wheat from me because they know I do not carry it. They do not ask for it. If they do, I tell them I do not have it, that I have Whole Wheat Biscuit. They can use that instead of shredded wheat if they want to. Sometimes they do and sometimes not.

It was a green-glass measuring cup, six different measurements on it. It was a premium given the customer with each package of Whole Wheat Biscuit. It did not cost me anything. I am a member of First United, a voluntary chain. I can get shredded wheat from them or direct through the National salesman. But they only had it once on a sale since I joined First United. I get the National crackers through a salesman, and I can order shredded wheat from the same man. I do not do it because they would not make good for my shredded wheat I lost. Some went bad on me. I held it for more than a year and a half. The last, I think, was about the middle of last September. I average about one to one and a half of Kellogg's biscuit cases a month now. Before I had it, I sold a case or less a month of shredded wheat. We did not have this chain store system then. It has helped us along in the grocery line, buying co-operatively. When I buy shredded wheat, I always buy it through the job-It is at present fair to say that that trade in shredded wheat has now gone over to Kellogg's Whole Wheat Biscuit, with a few exceptions. I have an Armenian trade, which uses shredded wheat, something like the shredded wheat in the old country. It is made fresh over there. It is not as fine as a shredded wheat.

It is in shreds like that, in long pieces. They make it that way and use it as a pastry. They make it like a little ball, with little holes in it, put it in a big pan on the fire and heat it, slit into it; and it takes very fine dough, like milk. He turns it around once and covers it up. That is whole wheat. We break it up with butter, just like a pie. We make it in the big pan and put some layer of the stuff with walnuts on top, then another layer, and syrup. Sometimes we cannot get that. Then we use either Kellogg's Whole Wheat or shredded wheat. We do that in this country. I had some this morning. We make it at home. When you do not get the real stuff, you could use shredded wheat for it.

RE-DEECT EXAMINATION.

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THE WITNESS: The product in the old country does not keep more than three or four days at the most. On and off, you see some new faces in the store. They look around, because we always have on display with cereals, Whole Wheat Biscuit. A lot of them have been getting it. In each case there is a box with a display window, showing a full display there. Three or four of those show right out. Some who have never seen it before will ask if it is something new and try it.

RE-CROSS-EXAMINATION.

THE WITNESS: No, they never say "is that shredded wheat," because they notice what it is. Some of them, I believe, ask if it is shredded wheat, I have no doubt. It looks something like shredded wheat. They see the Kellogg name on it and say: It is something new. Let's try it.

RE-DIRECT EXAMINATION.

THE WITNESS: I think it is an effective and attractive display. We had a few of those glassine pack-

ages in each case, displayed it that way, and it made more sales for us. When Kellogg's biscuit first came out, I had customers ask me what Whole Wheat Biscuit was like. We told them it is something like shredded wheat, put up by Kellogg's, and it was fifteen little biscuit, instead of twelve.

RE-CROSS-EXAMINATION.

RXQ. 126. In other words, it is a biscuit that the Kellogg people put up that can be sold for shredded wheat?

A. Well, about the same, yes, sir.

RALPH C. FOWLER.

Deposition taken at Boston, Massachusetts, March 28, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am in insurance. I use Kellogg's Whole Wheat Biscuit, and I have been a user of it for a year or a year and a half. It was first served to me at home. I believe my wife got it at one of the local stores. I had used the other Shredded Wheat before. Of the two products, I prefer this latest product of Kellogg's to the old-fashioned shredded wheat. biscuit. It is a little better size and flavor, and a litthe firmer biscuit. I cannot exactly explain the difference between the two. It is smaller, and I prefer it to the other for that reason. We have continued to use it in our household. I do not remember having any of the other shredded wheat since then. I recognize a difference in taste between the two products. I absolutely know one from the other. I think I could tell one from the other by taste alone, if I were blindfolded.

Whole Wheat Biscuit are moistened with butter, sugar, and milk and served on the table, in our house. We have the wife, two children and myself. The children eat Kellogg's Whole Wheat Biscuit.

CROSS-EXAMINATION.

THE WITNESS: For some years before I knew about Kellogg's biscuit, I had been using shredded wheat. I recognize Plaintiff's Exhibit 1 and the name. I have been familiar with that a long time. I think I have used it for a great many years. For a long time, I do not recall having anything else like that. I am a quite frequent user of shredded wheat, several times a week. I like it better than any other cereal. I have it several times a week for breakfast, and have had it for a good many years.

My wife purchased the Kellogg biscuit and placed it on the table. I saw the biscuit were much smaller than the others and inquired about it. She said it was a new biscuit. This was some time ago. When I first saw it on the table in the dish, I remember it looked quite different. I did not think the Shredded Wheat Company had changed the size of their biscuit. My wife told me it was a different product; but I noticed immediately the difference in the size of the biscuit. I would not say I have not used any shredded wheat since. I am sure I have, but not much. It is safe to say that, since that time, Kellogg's Whole Wheat Biscuit has taken the place of shredded wheat in my household.

ARTHUR FRANCIS RUSH.

Deposition taken at Boston, Massachusetts, March 28, 1933.

DIRECT EXAMENATION.

THE WITNESS: I am district sales manager of the Kellogg Sales Company and have filled that position a year in Boston. I have been connected with the Kellogg Company fifteen years, in capacities from crew

manager to salesman, to district manager.

After being a sample salesman, I was a jobber salesman under the district manager in Boston, dealing with jobbers, chain, retail grocery outlets. I was more or less of a service man throughout the whole territory. There is no authority or title for an assistant, I was in that class of work. I came up through the organization and became district sales manager.

In 1919, when I first worked for the company, in Boston, we worked out all over New England. My present territory is Maine, New Hampshire, Rhode Island, Massachusetts, and all of New England except

Connecticut.

We distribute Kellogg's Whole Wheat Biscuit in that territory and have a 40 to 42 per cent. distribution of it in the better grade stores. There is a consumer demand for it in this territory, as manifested through those stores. Some are chain, such as A. & P., voluntary chain, such as I. G. A., national, and chains like Nation-Wide Stores, a voluntary chain all over New England, and a voluntary chain in and about Boston, as well as New Hampshire, Maine, and Vermont.

The A. & P., probably more so with Kellogg than many others, not having advertised themselves as such, require consumer demand before they will put a new product in. They must have the pressure of con-

sumer demand through individual stores. When it is put in, it is on a special list. The individual manager of the individual chain store must ask his supervisor or superintendent of that special division whether he can stock that product in his store, telling him the demand he has for it.

We have distribution of our biscuit in this territory among restaurants and hotels, dining cars, inns, etc., represented by the individual cartons. The company pushes the sale of individuals at all times, for two purposes: It has an advertising value, and it will not deteriorate so fast in small packages. If a large package is kept in a kitchen, the steam from cooking would penetrate it and get into the product. The heat of the kitchen would then dry out the product or make it soggy and not nice to eat. It is our policy to educate the restaurants to handle the individuals. The value of the individual from a merchandising standpoint is good, because the carton is right in the bowl. with separate milk or cream container. The individual carton and the sample carton are both the same. except we have always used large-sized packages for promotional selling. The sample carton has across the top: Sample, not to be sold. The sample is given away, and the individual is sold.

To create a consumer demand for Kellogg's Whole Wheat Biscuit and to introduce them to the public as a new product, we have used sampling, house to house selling of one package, giving a second package free, window and ledge displays, mention over the radio, sampling of different friends, and so forth. We have had deals, giving the geography chart free with two packages, and Story Books of Games given away free for the children, to introduce it into the home. We have given Jungle Land Books free one with a package. We have had Saturday store demonstrations and

weekly demonstrations in super-markets, advertising in the newspapers, forty-inch promotional advertising, which we buy ourselves. The newspaper then goes out and solicits retail grocers with the ad, eight merchants to co-operate and pay out of their own pocket, using Kellogg's Whole Wheat Biscuit in conjunction with that sale.

In all the campaign, the product has been called by the name of Kellogg's Whole Wheat Biscuit. We have not, in this territory, in the last two or three years, sold any of it as Kellogg's Shredded Whole Wheat Biscuit. Our sales have been confined to Kellogg's Whole Wheat Biscuit. In the advertising and sampling and so on, the cartons have carried the name Kellogg's Whole Wheat Biscuit and emphasized that, on the large cartons, the dummy cartons, the individual cartons, the jumbo cartons with streamers, and the small window stickers, etc. We have used the big dummy jumbo display, with ribbons running out from it, dealing with the merits of Whole Wheat Biscuit, and, in conjunction with it, the dummy packages or regular goods in the window. The Kellogg Company has absolutely not sought to conceal the fact they were making a whole wheat biscuit. We are out to push it, advertise it, and let the world know we are manufacturing it, as well as the rest of the Kellogg line.

In one instance, we have encountered the small individual National package, like Defendant's Exhibit 81, in the restaurant trade. I understand the Waldorf received a shipment of it, sent it back, and made the boast they were the ones who made National change the biscuit back to the large-sized article. The buyer of the Waldorf told me that personally. I relied on that information and passed it on to my principals. Since then, I have not encountered the small individual size anywhere else in my territory. Where the Na-

tional has distribution in my territory, it is on the larger one, like Plaintiff's Exhibit 21. There may be other instances of the smaller, but I do not know of them.

I would say we have only thirty-five per cent. distribution of Kellogg's biscuit in individual packages in the better grade restaurants. We probably have fifty to fifty-five per cent. distribution in restaurants, at least throughout New England, from B grade down, but not A grade restaurants. Those figures are growing.

Our Saturday sales are selling of three packages of goods selected by the retailer or the man in the individual territory. Corn Flakes is a good seller in retail outlets. Pep or Rice Krispies might be a slow seller in a particular store. They would select a package of Rice Krispies, one of Bran Flakes, and possibly Corn Flakes, giving a package of Whole Wheat Biscuit free. We have a man in the store to conduct the sale and have the packages piled up on the floor with the geography chart, probably. We have always used that method in house-to-house selling and sampling, as we call it. We sell the retail grocer five cases Kellogg's biscuit and purchase back three cases at the suggested resale price of eleven cents. We take those and have men go from house to house and pay the men five cents on each sale, selling one and giving one free. Sometimes we buy the free package also from the retail grocer, but generally fifty per cent. is supplied by the company and fifty per cent, is purchased from the grocer.

We bid on institution business in this territory. We get requests for bids from institutions and hospitals. We may have a call for a thousand pounds of wheat. In Army regulations, there is no interpretation, aside from four different wheat products, listed on the back of the Navy specification, calling for twelve

and a half ounces of wheat biscuit. It does not say Shredded Wheat or Kellogg's Whole Wheat. • You must submit samples of the product before a bid is accepted. At times, it has called for shredded wheat, and we have put in Kellogg's Whole Wheat Biscuit, fifteen biscuit to the package, and twelve and a half ounces. I know about that institution bidding.

I have not known of any cases where a government department has sent back one product saying it was not what was bid on; because, before making any award, you always send with the bid a package of the product, so they have it there. They take it to laboratories and generally analyze the product to see if it is up to specifications. The bids specify the product by name and the number of ounces to the package. We have been very successful in bidding on that kind of work.

We have used quite a good deal of cellophane-front packages in this district, one package to the case, or two packages, and also twenty-four to the case; sometimes, twelve cellophane and twelve regular to the case. As district sales manager, I am charged more by the people at Battle Creek for the cellophane-front packages, twenty and a fraction. It is charged against selling cost and sales promotion per case for the year, against the Kellogg Sales Company, for instance, at 150 Causeway Street, Boston. The cellophane fronts carry a substantial charge, as a premium. That does not fall on the retailer but on the Kellogg Sales Company which pays that as promotion and selling expense.

These methods of introducing Kellogg's biscuit to the consumers' attention are always the same as 'methods used in introducing other Kellogg products. The company have been advertising that way for years. The men are instructed to go in and say: "Mr. Dealer, all I want you to do is to put the product in and ask the customer to take a full package and eat all they wish. If they are not satisfied, tell them to return it. You return their money, and we will return yours."

I would say that, among our wholesalers, retailers, and consumers in the district, a knowledge of the Kellogg biscuit has been advanced and they know there is such a product. Those people interested in cereals would know. All those who eat the shredded wheat product would know that Kellogg is in the shredded wheat business, and that there are two biscuit of this kind.

The distribution of Kellogg's biscuit in our territory, in the wholesale line is ninety per cent. Ninety per cent, of the wholesale houses regularly carry the Kellogg product. I have built up a substantial andconstantly increasing volume of business in the territory on Whole Wheat Biscuit. The retail price of the product varies. In the small outlying towns, they got twelve cents for either product, except voluntary chains, two for tweny-one or nineteen. When one of our deals goes over in a town, it brings it down to eighty, costing them ninety-one cents, which makes a difference. During that time, voluntary groups and independents feature ours at less. The chain stores, like A. & P., get eleven cents for Kellogg's Whole Wheat at all times, and sell National shredded wheat two for mineteen. They reorder each month on Kellogg's.

The Kellogg Company in this territory gets a very fine volume of dealer co-operation by reason of advertising in the newspapers, probably as great if not greater than in any other territory in the United States. We make no advertising allowance whatsoever. I have never heard of any confusion in the trade or any instance where a consumer bought one kind and sent it back saving it was the other she had ordered. Today

in New England, we boast that substitution is not practiced as much as it is in other parts of the country. Our people pride themselves on that. People are not so receptive to substitution as they used to be. For instance, other companies have introduced other lines, such as corn flakes, with a great deal of work, and have not gotten far with them. Post Toasties are a good seller in some parts of the country. They changed their package here to three-ounce Post's Corn Flakes and offered them in substitution. They not only withdrew that but withdrew Post Toasties here in Massachusetts. It is a practice less effective in New England, probably, than elsewhere. I hear it is practiced throughout the West, in substituting different brands of merchandise.

The work of Kellogg's in this territory has tended to stimulate the general demand for Whole Wheat Biscuit. We have had ten times as much more advertising and sales effort and work in the trade among consumers by Kellogg than from the National Biscuit Company for shredded wheat biscuit. Of every kind of biscuit, reports come in from eighteen towns throughout New England that we are doing from six to ten times as much. If we had as much work behind the National shredded wheat as we have had behind Kellogg's biscuit, that would help to sell that product, also. When they stopped their sampling and things like that, it helped us considerably. They stopped all their merchandising efforts, house-to-house selling. They did some house-to-house sampling last year and some advertising. Compared to what they did before, they did not do one one-fifth as much as under the old Shredded Wheat Company. They used to sample four or five times a year, keeping their trucks busy. They would take orders. They hired salesmen. As far as retail outlets went, they had nothing but promotional work. Those men are no longer with that promotional

end. They had sampling, window displays, tacking signs, making ledge displays, and so on. The jobbers had to solicit the retailers themselves, leaving the promotional men free for more work. That was cut down until last year, when they did a little more of it, some sampling in a few parts of New England and house-to-house selling, in a few selected towns, such as Burlington, Reading, and Portland, selling one package shredded wheat, giving a second package free, and through some civic organizations, but not one small part of the volume of effort of the old shredded wheat.

A year ago last January, National went direct to the trade. They would sell the retail grocer direct, four packages, or twelve or thirty-six. It formerly sold entirely through the wholesaler in thirty-six-package cases, at a profitable price. The wholesalers naturally felt peeved. They maintained overhead as far as wholesale distribution was concerned, and their profits on shredded wheat had been taken away from them. Those who sold at a low price did not make that percentage, anyway. In general, the wholesalers were up in arms against the National. A great many of them actually came to Kellogg and asked to have it featured, did everything possible to feature Kellogg's Whole Wheat Biscuit in the way of promotional and general advertising they were doing at that time. The Kellogg Company did not have to go out and dig that up. They came right to Kellogg in conjunction with advertising, window and ledge displays. When the National adopted that policy, they were deprived of the sales co-operation of the wholesalers. I think I would be safe in saying eighty-five per cent. of jobbing salesmen in New England would not mention the shred-'ded wheat at all, for a short time, anyway. The wholesalers figured there was no profit, that the retailer could buy at the wholesale price. They had the graduated scale of discounts, seventeen and a half if you bought a thousand dollars worth.

The National shredded wheat biscuit has always been more or less of a loss leader, especially in the last four or five years, since a great many of the nationally advertised products have been put in that class. Three or four years ago, when price-cutting was prevalent on all products, the retail grocer tended to feel that a manufacturer who would allow price-cutting of that nature was not giving them a fair show. Today, with voluntary chains and the way most goods are cut, especially nationally-advertised products, I think it hurts their standing with the independent, especially when the chain stores continuously offer it at near the cost price. The National product has been badly cut as long as I can remember. Chain stores have it now two for nineteen.

Kellogg's biscuit has been sold on absolutely a candid basis, as far as the consumer is concerned. We would tell them our biscuit was more convenient in size, toasted top and bottom, toasted through the center, better flavored than shredded wheat, if that name was brought into it at all. We do not believe in mentioning the other biscuit, because, if we mention it at all, we believe we are advertising it. We have enough to do to advertise ourselves. The size, number of biscuit and weight per package have been emphasized in our dealer helps, on our packages, and in our store display; a half-ounce extra per package, fifteen biscuit, convenient bowl size. On the Saturday demonstration sales where a Kellogg salesman has been in the store. in most instances, whether he has a cellophane-front package or not, he has one opened. If it is generally displayed in a food fair or market, you have the biscuits opened up and piled in a bowl, to let the customer see the exact size. He would turn the biscuit over, showing them toasted on both sides, would probably

break one open to show it is more toasted in the center. It is a darker biscuit than Shredded Wheat.

Regarding a previous question about demand. I think of one instance, a wholesale grocer in Boston who used to order ten straight cars of shredded wheat a year. He now buys twenty-five cases a month. He is one of the wholesale grocers we do not get a great deal of support from. He buys only two hundred to three hundred cases Kellogg's biseuit a year. Comparing his total-volume on both products, adding the two shredded wheet products together, he is losing from his previous volume of business seven cars a year. That prevails in two different instances. The Kellogg Company absolutely guarantees the sale of its new product. They would take back from either retailer, consumer, or wholesaler any product which did not That means a whole lot in introducing a new product to the trade. You guarantee the sale of a product, let a man know that, if the consumer does not ask for it, even without effort on his part to sell it, you will take it back, that plays quite a part in taking it on.

The Kellogg Company does not rely exclusively on national publications. Mý teacher was Mr. Kenney, now district manager of the National Biscuit Company for New England. He taught me that, in selling a man a product, you have to sell him the idea of using it himself. If he eats it himself, uses it in his home, recommended it to the consumer, you sell the merchant a case and display it prominently, floor, counter, or ledge. If the man advertises, try to have him incorporate it in his local advertising, handbills, window posters, etc. Then sample house to house to your consumers, all promotional work to get people to use it, and have it in national and local advertising. That is how we did our New England business here on Kellogg's biscuit. Corn Flakes outsells shredded wheat

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by far. I was not in business when the Ross Biscuit was on the market.

CROSS-EXAMINATION.

THE WITNESS: I have conducted a very energetic campaign to introduce Whole Wheat Biscuit here in my territory. I have been right on my toes all the time, and I have to be today. The misfortunes of the National with some jobbers have given me a very good chance to get in with the jobbers. It gave me an opportunity to get in the market here; and I have had the co-operation of those jobbers, at the same time that there was some feeling of hostility toward the National Biscuit Company.

I know the Cross Abbott House, at Wood River Junction. They are still handling National shredded wheat in large quantities. His brother-in-law happens to be connected with the National, and, when the National took over shredded wheat, they went to them. They still sell it in large quantities. That was due to a misunderstanding with some Kellogg men. told us then he felt toward the National as other wholesale grocers did. He placed an order with our salesman, Mr. Conklin, for three hundred and fifty cases. He canceled the order the following morning, after being contacted by the National Biscuit Company man up there. He buys a little Whole Wheat Biscuit from us all the time, but not in quantity. He is the only man in New England who buys shredded wheat in quantity. I would not say he is the only jobber in New England friendly to National, but the only one who buys it in any quantity.

The concern who used to buy ten cars a year of shredded wheat is the Standard Grocery Company, Boston. They only buy twenty-five cases a month now. I know the reason for that. It does not mean that

shredded wheat is not being sold. The National is servicing stores on shredded wheat. It does not simply mean that shredded wheat is noving through other channels. They claim from their own individual meetings. We claim from having a demand. The Pieneer Stores sell it through individual retail stores and know the product has fallen off in consumer demand. Some of that consumer demand Kellogg has acquired for its Whole Wheat Bisquit.

XQ. 152. There is no question in your mind but that the Kellogg's biscuit is competing directly with shredded wheat, is there?

A. Well, we are in the shredded wheat business.

XQ. 153. Exactly.

A. And we want to let the people know that we are.

XQ. 154. Exactly. You are making and selling a biscuit that is designed to occupy that field?

A. Yes.

XQ. 155. And you want to get your share of it? .

A. No. We are not foisting our product in the mind of the consumer that it is a shredded wheat product. We are putting it on the market as a Whole Wheat Biscuit and shredded wheat product, just as it says on the side.

XQ. 156. Yes, although you use the words shredded wheat.

A. We do not want to push the other fellow's product. We do not want to help him.

XQ. 157. Yes, although you do carry on the end of the package: A shredded wheat product; and, on the other end: Shredded wheat in its most delicious form.

A. Yes, absolutely.

XQ. 158. I did not use the term in its disparaging sense, but you are putting every effort forth to occupy as much of that field as you can, are you not?

A. Feeling at the same time that, if there is a demand for a product made out of wheat, shredded and toasted, we are entitled to get our share of it.

XQ. 159. Yes, and, on that basis, you are compet-

ing vigorously with shredded wheat?

A. Yes.

THE WITNESS: We are taking advantage very naturally of the opportunity afforded by the change in the manner of distribution introduced by National,

to get the jobbers to handle our product.

As I said, the Navy specifications call for a thousand pounds of wheat. They do not call for shredded wheat; but a thousand pounds of corn, or wheat, or rice, or bran. I know of no specifications from the Navy for shredded wheat. It has been in the past. On specifications of that kind we have written in: Kellogg's Whole Wheat Biscuit, have put our prices, and gotten the award. Where the bid is asked for by the pound, our price is sometimes lower than the National, sometimes not. The National has taken business away from us. They have taken it away where there is an alternative for the bid, shredded wheat or Kellogg's Whole Wheat Biscuit. On the last bid, in some state institutions in Massachusetts, a bid has been awarded to both parties and the institution allowed to state which one they would take. We have doubled our business in that Whole Wheat Biscuit. I suppose that was put in to permit the National Biscuit Company to take that business.

We have a distribution on biscuit in 42 per cent. of the better stores in New England, but not the chain stores. We have a larger percentage of the voluntary chain than that. When we operate through a jobber, we are able to get better co-operation. The A. & P. carry our line in their Springfield warehouse, and at a Boston, Portland, and Providence. I think some of

their individual retail stores buy them directly from Kellogg men. In the Portland and Albany districts, A. P. I. Cohen of Burlington supplies them.

Our 35 per cent. distribution in restaurants is Class A. We have a larger percentage of distribution among smaller restaurants, lunch, counters, little Greek restaurants, dining cars. Many of them carry both items. Many others carry our item alone and still others shredded wheat alone. We do not, of course, advocate their calling our item shredded wheat. While it may be so, I could not actually testify that I know as a fact that, quite often, they carry any item on the menu card, shredded wheat, which is our line. I would be surprised if you know it to be a fact that there are some restaurants who carry our product and have listed it on the menu as shredded wheat.

According to my personal interpretation of substitution, I would consider that, if I were a retailer and you came into my store asking for Kellogg's Whole Wheat Biscuit and I handed you a package of Kellogg's shredded wheat, without a word, or foist the other upon you, saying it was the very exactly same thing put out by Kellogg's, that would be substitution, something in place of the other without any explanation. But if a girl asked a grocer for shredded wheat, and he said I do not have it, but here is a Kellogg product, a smaller biscuit, fifteen to the package, I would not say that was substitution, because he gives an explanation. If he foisted it on the party with intent to deceive them that it was shredded wheat itself, although it is a shredded wheat product, I would call that a substitution. If he had them both and the party asked for shredded wheat, and ne made full explanation, saying he had shredded wheat, but this costs the same and has more biscuit, smaller biscuit, better to serve, introducing the customer to it in that way, that

would not be substitution from my point of view. That is merely salesmanship, merchandizing on his part.

Kellogg's Corn Flakes have been used as a loss leader often. It has been kicked around quite a bit. I do not believe the substitution, as I have defined it, is practiced very much in my territory as it may be elsewhere. I do not think they go in very much for substitution in New England.

Referring again to Cross Abbott & Company, with all their friendliness toward that and their antagonistic spirit toward co-operating, last week they took in five hundred Rippled Wheat, of Loose Wiles, and put that out on the market, sold in grocery stores, from one to twenty-five cases apiece. My observation has indicated there is consumer acceptance of that product. It is flat biscuit, more or less like Triscuit, with it raised a little, four little ripples across the top.

I do not think there has been any great increase in the morality or ethics of the grocers, but the voluntary chain movement has made them build up their stores and make displays. It used to be the first thing you could put your hand on. If I went in and asked for either product, it would be: Where in the world did I put that one! They are waiting on them today with less help. Their lack of ethical conduct is somewhat less. I would not say offhand that I could think of any one deceptive package on the market today.

I am very careful in my work about distinguishing the rame shredded wheat from Kellogg's Whole Wheat Biscuit, without mentioning the other. I cannot very well specify the merits of our product without comparing it with shredded wheat in some way, except by opening a package and letting them taste it. In bringing out that it is a shredded wheat product, more to the package, smaller biscuit, it is not necessary to compare it with shredded wheat. I just say it is

shredded whole wheat, double to sted, Afteen to the package, a half ounce more to the package, more than the other. I have to compare it to the other, absolutely. If he brings out the name Niagara with it, we admit we have a shredded wheat there and tell him right out that we have. I admit it is a shredded wheat product. We do not say it can be sold to the same market, but we just say it is a shredded wheat product.

Kodak means to me a camera, and Cadillac a certain kind of automobile, Lucky Strike, a kind of cigarette.

XQ. 225. You would not have any doubt about that package I now show you, would you?

A. No.

XQ. 226. What is it?

A. A package of Camels cigarettes.

XQ. 227. Will you read what is on the back of it? A. Yes. "Hat cleaner for felt, straw, panama, cloth hats."

XQ. 228. Yes. Yet, when I held it up you had no doubt, did you, that it was a package of Camels cigarettes?

A. Absolutely not.

XQ. 229. And it closely resembles this package of Camels cigarettes that I have here, does it not?

A, Yes.

XQ. 230. It is a Chinese copy of it?

A. Yes, this is a copy of it, surely.

XQ. 231. That is what you would call an imitation package, is it not?

A. That is what I call an imitation.

XQ. 232. It could be plainly substituted for the package of cigarettes. It is a fraudulent package, is it not?

A. Yes.

(The package referred to was received in evidence and was marked 'Plaintiff's Exhibit 208.''

The genuine Camel's Cigarettes package was received in evidence and marked "Plaintiff's Exhibit 209.")

THE WITNESS: We do not have general demonstrations. If the boys book a Saturday sale and cannot take care of it, they hire a young lady to demonstrate once in a while. We may go into a food fair or something like that. Demonstrators are instructed to display prominently the cellophane-front packages, to explain the biscuit itself, to sell the package for whatever the retailer agrees at that time, two bought and one free, or straight for ten or eleven cents.

If the customer asks if it is shredded wheat, they are instructed to say "It is a shredded wheat product. We would like to have you look at it." We do not exactly give them those instructions. That has probably been said. We only use them for a day or so. It is a question that probably arises in most demonstrations. I had a Miss Evelyn Ealy down at the Brockton Public Market. She is not one of our regular demonstrators; just worked for us one week this year. I never heard of her before or since. I would not be surprised if she had told the public this was a shredded wheat product. It is a very natural thing to say, because of the close resemblance between the two products.

RE-DIRECT EXAMINATION.

THE WITNESS: We have in the territory the Manhattan Food Stores, who had sixteen self-service stores in greater Boston until October last when they went into bankruptcy, the same type as Piggly-Wiggly stores. The customer goes in, picks up a basket, walks around, takes the goods off the shelves into the basket. At the counter, the bundle is done up and paid for.

Both Kellogg's Whole Wheat Biscuit and National Biscuit Niagara shredded wheat were sold there. Kellogg's sold ten to one of the other. He was such a good customer it was a shame he went into bankruptcy.

RE-CROSS-EXAMINATION.

THE WITNESS: He is rather poor credit, still opening up again. He was out of the market for a while. I think he carried a full line of National Biscuit.

RE-DIRECT EXAMINATION.

THE WITNESS: In the restaurant trade in my territory, National shredded wheat is used in large-sized individual cartons, like Plaintiff's Exhibit 21. I only know of one instance of their trying to introduce the small sized biscuit. I have never seen any since, and that was withdrawn from the manager who showed me the package and gave me all the information on it. I have never seen any of the National shredded wheat cases.

RE-CROSS-EXAMINATION.

THE WITNESS: I sell the restaurants and lunch counters a combination case, containing a few items, including Whole Wheat Biscuit, which has been successful in a small way in introducing the products. We sell the combination case to small restaurants that have no credit through the jobber, only to give full distribution of our five products where otherwise they would not be able to carry the full line if some of them had to invest seven or eight dollars. They will invest a dollar seventy-five for a hundred and two packages mixed.

RE-DIRECT EXAMINATION.

THE WITNESS: Referring to Plaintiff's Exhibits 208 and 209, assuming them both to be cigarettes under the name Camel, one being made by R. J. Reynolds Tobacco Company, the one not made by Reynolds would

be an absolutely deceptive and fraudulent substitute, an infringement altogether on the rights of the copyright owner.

The fraud here, if there is one, is in the making of the hat cleaner package so like a cigarette package that people would assume it was put up by R. J. Reynolds Tobacco Company, My experience in the trade goes back to the time when deceptive substitutes of that kind, like two brands of Baker's Chocolate, were on the market. The courts, by injunction, have pretty well cleaned up those deceptive substitutes. An entry was issued through the trade to hold them up. Thereafter, they were taken off the market. I do not believe Mr. Vilas, if he were to go from here to Honolulu, could attempt to go out into the trade to find whether those two packages are similar. This substitution would be absolutely open on its face. The customer might walk home and say, "W . I got some Camel Cigarettes." If he did not like them, he would say Camel Cigarettes were rotten, whereas he might never have smoked a Camel Cigarette.

If somebody went into a store, asked for Camels and were handed Chesterfields, that would not be a deceptive substitution, where the name Chesterfield was spread over the package; because, if they took them away without actually knowing, they would see and know they were not getting Camel but Chesterfield Cigarettes. It would not be a deception in that respect.

Demonstrators have not been instructed by the Kellogg Company to make any special reference to shredded wheat. When we have a demonstrator to sell Kellogg's Whole Wheat Biscuit, we feel, if she is going to talk about the other product, she is helping sell theirs, which we do not want. We tell her that, if a lady should say right out: "Is that a shredded wheat product?" she is to say, "Absolutely, it is a shredded wheat product, Madam."

Stipulated Testimony of Mrs. Norma Clark 1731

We do not just want to make that one sale by that demonstrator. We try to impress on the consumer that she is buying Kellogg's Whole Wheat Biscuit, and to come back and demand it a second time.

RE-CROSS-EXAMINATION.

THE WITNESS: I would be very much surprised to learn that we have demonstrators that have given the impression this was a shredded wheat biscuit. I am not familiar with the testimony taken here on behalf of the plaintiff last December. I was not present then. I recall hearing that it was testified that a wholesale grocer had sold an entire case of Kellogg's biscuit as shredded wheat, in response to an order for shredded wheat. I know Mr. Verret of Burlington. This is an incident that happened to him, I believe. As I understood Mr. Verret's testimony at the time, he just said he carried both products. If a person came in and wanted shredded wheat, he would give them what he wanted. If they wanted Kellogg's, he would give them Kellogg's. Mr. Verret is not stupid or thick. He is a very good customer of ours.

RE-DIRECT EXAMINATION.

THE WITNESS: He is a good customer of the Kellogg Company and spoke afterwards to our man about the testimony he gave then.

· Stipulation re testimony of Mrs. Norma Clark:

Mr. CLARKE: Would you have any objection to stipulating as to just one witness?

MR. VILAS: Which one is that?

Mr. CLARKE: That she would testify as follows: What would you say that she would testify to?

1732 Stipulated Testimony of Mrs. Norma Clark

Mr. Rush: Mrs. Norma Clark, of 553 Commonwealth Avenue, Newton, Massachusetts, if called as a witness, would testify that the Kellogg Sales Company of Boston supply her weekly with Kellogg's Whole Wheat Biscuit and other Kellogg products.

Mr. VILAS: In sample form?

Mr. Rush: No, in the full package, to be used in sample form; which she gives out with many other commodities of other manufacturers, to people moving into new homes in Newton, Watertown, Waltham, Weston, Wellesley, Woburn, and a certain section of Cambridge, Massachusetts, right down in the portion of Cambridge where there are professors of Harvard College and such as that, all down around the college, in a very restricted section. They do not take every Tom, Dick, and Harry there.

Mr. CLARKE: You are giving her these sample packages—

Mr. Rush: We are giving her these sample packages, and she is distributing them. She is also being supported by very many retailers and such people as that, who are furthering the sale of Kellogg products throughout Newton.

MR. CLARKE: Is that stipulation satisfactory to you, Mr. Vilas?

Mr. VILAS: Yes, we will assume that that is what she would say.

MRS. BETSEY JAMES.

Deposition taken at Boston, Massachusetts, March 28, 1933.

DIRECT EXAMINATION.

THE WITNESS: I keep house with my mother, the two of us in the house. We consume Kellogg's Whole Wheat Biscuit, and have had it about two years. I like it. It was first introduced to me by a sample left at the door. I liked it. I got further supplies of it at the grocery, under the name of Kellogg's Whole Wheat-Biscuit. I have had no difficulty getting it under the name. I never had any other product handed to me when I called for it. I would not take it, anyway. I used the old Niagara Falls product; and that is why I came to use Kellogg's. I liked it better, smaller and better browned. I liked it generally much better than the other. I have continued to use it since I got the sample. We use practically all the Kellogg products. I came to testify today, because a man whom I did not know before came to my door. I told him I would show him how good Kellogg boosters we are, and I showed him five other Kellogg products on the pantry shelf. I do have Kellogg's Whole Wheat Biscuit. I like it a whole lot. I would not take anything else.

Cross-Examination.

The Witness: We formerly used shredded wheat; but it was too large to handle and we got too much at once. I did not care much for it, because, with milk or anything on it, it did not hold up so crisp. I have used shredded wheat, Kellogg's, fo. about two years. We used a lot of shredded wheat when it was the only one we had, until we started getting Kellogg's. My mother used it. We only used them once in a while. We used about a box once a month, for about a year before Kellogg's biscuit came on the market. I have

1734 Deposition of Mrs. Betsey James

known about shredded wheat for ages, but I have not eaten it. It is a very old product and I have known it for ages. I did not buy them frequently. After we got this sample, I bought Kellogg's, and I now buy that instead of shredded wheat. I do not buy any more shredded wheat. There are five of us and we all eat Kellogg's. We have corn flakes one morning, Pep another morning, and so on. I think you could call them a Kellogg family. Now we have Kellogg's biscuit, that is complete. We do not eat any other cereal. I do not know how the Kellogg salesman got my name. I buy my cereals at Thomas Arnold's grocery.

RE-DIRECT EXAMINATION.

THE WITNESS: That is an independent store, service type.

RE-CROSS-EXAMINATION.

THE WITNESS: I do not buy anything from Torphy's store on Wittemoe Street. That is a long way out from where I live.

RE-DIRECT EXAMINATION.

THE WITNESS: If I want one product and my grocer hands me another, I will not take it. If I were to order a certain product and the grocer said he did not have it but had one he thought was a little better or a new one, if I liked really what I had ordered, I do not want a substitute. If the grocer asked me to try a new product, I might. I have tried things. If I did not like them, I would not bother to buy them again. I am particular that way.

MRS. NORMA A. KING.

Deposition taken at Boston, Massachusetts, March 28, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, just my husband and myself in the household. I am a consumer of Kellogg's Whole Wheat Biscuit and have used it at least six months. I first saw it on the shelf at the grocer's. Athought I would like to try it, bought a package of it, and have liked it ever since. For one thing, it is small, crisp, and has a very good flavor.

I had before used the old Niagara shredded weat. I have not since wanted to fall back on it. I have a decided preference for Kellogg's biscuit and have stuck to it since I first used it. I have ordered it from my grocer under the name Kellogg's Whole Wheat Biscuit. I get corn flakes, too. Since I have asked for Kellogg's Whole Wheat Biscuit, I do not get any other product.

I came to testify today because some Kellogg man came to my door. I did not know the man. He asked me which I would prefer and if I would appear here today.

CROSS-EXAMINATION.

THE WITNESS: I am a former user of shredded wheat. I have been familiar with the package, Plaintiff's Exhibit 1. I have known that for a long time; I would think about three years, since I have been married. I did not take much notice of it before. I do not think I have anything else given to me for it. I never had the Kellogg biscuit offered to me when I asked for shredded wheat. I never asked for Kellogg's shredded wheat. I ask for Kellogg's Whole Wheat Biscuit. Since I first saw it on the shelf at my grocer's, I have bought it in preference to shredded wheat. I do

not use shredded wheat any more. My grocer is C. A. Medlin, on Summer Street, not a chain store, merely a neighborhood grocer. When I saw Kellogg's biscuit on the shelf, it was in a package like Plaintiff's Exhibit 161, with a picture of a dish with two biscuit. I do not think I ever saw a package like the other side of Plaintiff's Exhibit 161, with a window in it. I just bought it in a package with the panel on both sides, with a picture of a dish with biscuit.

CRESSON A. MEDLIN.

Deposition taken at Boston, Massachusetts, March 28, 1933.

DIRECT EXAMINATION.

THE WITNESS: I run a little variety store at 101 Summer Street. I handle all groceries, take telephone orders and have a route. I make deliveries, and I extend credit where it is justified. We have to do plenty of that lately.

Learry Kellogg's Whole Wheat Biscuit regularly in stock. I have had it as long as it has been out. I do the same as many others, when a new product comes . out like that. We generally put it on anybody to try it, to see if it will go, especially when we have found that all the rest of the goods of the company putting it out are good. There is, without a doubt, a consumer demand for that product in our store. They say they want Kellogg's. They say it is a smaller biscuit, crisper, and they like it better. I asked customers to try it. I do not do much talking about anything. I just show them what I have, and I tell them I have tried it myself and think it is better, ask them to try it, and tell them if they do not like it, they can bring it back. In each order they ask for Kellogg's shredded wheat. That is what they ask for, naturally. On each order,

when they ask for Kellogg's shredde wheat, I give them Kellogg's Whole Wheat Biscuit.

I handled the other product, Niagara Falls shredded wheat right along, until I found people had gotten used to using this and it was just useless to put it on the shelf. I no longer got consumer demand for the other product. Once people tried Kellogg's, they never asked for the other any more. I had to drop the other altogether, for that one reason, when the demand for it ceased.

I never, that I remember, had any mixup or confusion between the two products, when I was carrying both. I never had any customer send back one and say she wanted the other one, as far as I recall. The customers differentiated between the two. They would just ask for Kellogg's, and that was all there was to it. There would not be much chance of getting mixed up, that way. I handle the other Kellogg products. That is, no doubt, an advantage in selling it. That is the way I figured it. My family is big, and I used quite a lot of it. I always try it myself, so, when I am talking about it, I know what I am speaking of. My family use it, and I still use it. I used to use the shredded wheat of Niagara Falls, always. If I preferred it, I would be using that now. I like Kellogg's. I have nine in my family. The rest of my family and some of their families they brought home like the Kellogg biscuit. We have eleven now. Some are married. It is quite an accession to the Kellogg family of users.

I have all the co-operation that is necessary on the part of the Kellogg Company in creating consumer demand for Whole Wheat Biscuit. I have store and window displays. They are on display now, which tends to attract the attention of consumers. What I do is to change the different displays around, in the window displays, which is good salesmanship. You cannot

have the same thing there all the time. The purpose of a store display is to push the product. You have to let people see that you carry a line of goods they want. If they want it, they come in again, naturally. Some people passing by might think you did not carry that particular brand. If you put it in the window, they know they can get it there. That is our way of introducing new products to our customers. Any new product we put in, if the people do not give a window display, we naturally put it in ourselves, mix it with other goods we want people to know we deal in. We have distributed samples of Kellogg's biscuit, put them in with orders, and give people one to try when they call. I have done that with Kellogg's Whole Wheat Biscuit. We have been furnished from time to time with store displays and cards advertising Kellogg's biscuit. I have used a whole background of Whole Wheat Biscuit in the window, a display with a big jumbo carton of Whole Wheat Biscuit in it.

I charge eleven cents for Kellogg's biscuit. When we carried Niagara biscuit, it was twelve and went down to eleven.

We sell about two and a half cases Kellogg's biscuit a month. When I had shredded wheat, I did well to sell a case a month, so this is a much larger sale of Kellogg's than I ever had of the other. I do not handle shredded wheat; I handle another line. Ever since I have been in business, I find you have to change once in a while. People tire of coming to a store and seeing the same thing. I had National Biscuit there for five or six years. I changed it the last three years. I handle the entire line of Atlantic biscuit now. I did handle Uneeda Biscuit. Without a doubt, I certainly had trouble with price-cutting on that. That is one of the big arguments I had about it, and, I suppose every one else in the same boat did, too. The dealer feels

that the little stores made those people what they are. They go right around behind our backs as soon as they get a couple of million dollars and cut our throats. Uneeda Biscuit used to cost us four and three-quarter cents a package. The chain stores and five-and-ten offer them three for a dime. They tell us they are using them for a loss leader. They must think we are pretty thick. How would you feel when a man came and asked only three for a dime when you know you are paying more.

I think it hurt the sales of Niagara shredded wheat to have it taken up by the National Biscuit Company. Sales were not so big, when the National took over, as under the old Shredded Wheat Company, in my opinion. Naturally customers would ask me what kind of product Whole Wheat Biscuit was. I think I would tell them it is a better product altogether, because I have tried it myself and think it is better. All they have to do is eat two. If they do not like them, they. may bring them back. I never had a package returned. Every one was more than satisfied and asked for them again in preference to the others.

CROSS-EXAMINATION.

THE WITNESS: I mean better than the old shredded wheat they had at the National Biscuit Company, of course. That is what they tell me. I have known the old shredded wheat for a long time, without a doubt. That is one of the old packages, Plaintiff's Exhibit 1. I have been in the grocery business about eleven years and have always known this shredded wheat during that time. I used it at that time. It has been a household article, and I have always known it as just shredded wheat. When people asked me for shredded wheat, I knew what they wanted. When they came in and asked for shredded wheat, that was the only thing we had that was shredded wheat, and we handed that down. That is the only name it was known by and the only article, I gness, at that time that answered to that name. It was a good seller during the eleven years. I am a mechanic in my own line. I just came and tried this, because Mike Lee sold out. He had shredded wheat then, and I ordered it from the jobber.

It must have been somewhere along about the time that the National took over shredded wheat that the Kellogg Company came in with its biscuit, as far as I can remember. At any rate, Kellogg's biscuit is a newer biscuit, and it came on the market recently. The story is that people who used to buy shredded wheat now buy Kellogg's Whole Wheat Biscuit, a lot of them. Mrs. King was one of my customers, and she has bought Kellogg's at my store. I showed it to her. Maybe fifty or a hundred will tell you the same, that they were converted from shredded wheat to Kellogg's, about the same thing that she told you, that they like it better because it is smaller and more crisp, more to the box, and a better product, as they claim. I think the profit on the two is about the same. I do not think we buy Kellogg's a little better than we do shredded wheat. We carry a thousand different items, and it is hard to remember everything. I am not a member of any chain or purchasing group. I do not allow any one to tell me what I am going to do. I have groceries and a little Arnold Chamberlain's meat, and a little of everything; but groceries is the main part of my store. It is a food store. When I said variety, I meant I sell almost everything, like oranges, apples, and a little truck stuff they need in the evenings when everyone else is closed.

My customers have learned, when they come in, to ask for Kellogg's shredded wheat. I handle no National products now. I am not well disposed to-

ward the National Biscuit Company; but, if a customer asks fer a product, we have to sell it. I am there to sell everything I can sell. My customers do not ask for it. I have shredded wheat on my shelf there and they could make their choice. I have had window and floor displays and demonstrations of Kellogg's Biscuit. I did that for shredded wheat before I got Kellogg's biscuit in. I do not push anything. I figure I have to have what the people call for, or they will go somewhere else. I give them Kellogg's to try. If they do not like it, they can bring it back. If a customer who has been using the old shredded wheat comes in, I do not ask him to try it. We figure they know that product. "If people want it, they will ask for the old shredded wheat. That does not require the push and advertising that Kellogg's biscuit does. That is why we do not figure they demand the Niagara product. But Kellogg's biscuit will take the place of shredded wheat.

RE-DIRECT EXAMINATION.

THE WITNESS: I do have customers ask me for Kellogg's Whole Wheat Biscuit. As to which name, that or Kellogg's shredded wheat, is used most, of course, some people get mixed up in that way, you know. Some will ask for the biscuit and others will ask for the wheat. It is just a matter of average on that. I know some ask for Kellogg's Whole Wheat Biscuit and some for shredded wheat. I certainly do not see why Kellogg's biscuit is not a shredded whole wheat biscuit.

RE-CROSS-EXAMINATION.

THE WITNESS: It is quite natural, when you have two biscuit so much alike, that people will get a little mixed up on them. I should not say it is anything to be surprised at. Some people get mixed up with a very little thing. Just the same, when people get Kellogg's, they all see the difference in a very short time. Naturally, they notice the size. They see the difference when they eat them and will come right back and tell you it is a better biscuit. I find people are sometimes careless or casual about buying and are apt to pasover things. That is quite natural.

RE-DIRECT EXAMINATION.

THE WITNESS: I cannot recall any customer sending either product back and stating she wanted the other. I have had kids bring back the others and ask for Kellogg's once or twice.

RE-CROSS-EXAMINATION.

THE WITNESS: That is when they come in and ask for shredded wheat and get the old package.

HARRY MAZMAN.

Deposition taken at Boston, Massachusetts, March 28, 1933.

DIRECT EXAMINATION. .

THE WITNESS: I am general manager of First United Stores, Inc., a voluntary chain. About 35 per cent. of our stores carry their independent names, and the rest First United. They have the emblem in front of their store windows. I have a retail store that I own at 910 Mass Avenue, Cambridge.

All the members of that voluntary chain carry Kellogg's Whole Wheat Biscuit. We carry them because there is a consumer demand for that product in our stores. Our stores have given co-operation to the Kellogg Company in creating consumer demand for

all their products. When we took Kellogg's biscuit, all their items were known to the consumer through advertising. We took the biscuit and advertised it. The first sale went over, showed an increase of at least 75 per cent. Of course, that was put over with the cellophane cut in front showing the public what the biscuit was. In my list to the members I instructed them to display this one package in every case in the middle of their stores, showing the consumers what Kellogg's Whole Wheat Biscuit is. The name alone does not tell the consumer what the product is. They would want to know what kind of biscuit it was. Whole Wheat Biscuit could be any one of a dozen different products.

We put out fifty thousand hand-bills advertising Kellogg's Whole Wheat there, three or four times last winter. Our stores have given window displays and store displays to Kellogg's biscuit. I do not know whether they furnished any names for sending out

coupon cards to.

We do not carry Niagara shredded wheat, because, when Mr. Allen was their representative or manager at Boston, at that time, they wanted to sign up with us for the entire line of National Biscuit products, and he came back and forth to me, just like a person going out on a shopping tour, from one store to another. He was doing the same thing, shopping around, to see if he could shop along with me. I laid out my plan. I told him that I thought, if the chain stores could have a certain amount of discount, we were just as much entitled to it. He told me, if I was doing a thousand dollars' worth a month, we would get the same discounts as the chains. If a man was doing one cent less than a thousand dollars sales a month, he would not be recognized on the new discount of 17½ per cent.

He kept coming and shopping around, not giving me an answer. I told him it was the last week and it was one of the two, his or Sunshine. Whoever would make the right adjustment. I would go along with. He was to let me know. Then the Sunshine man came around with the same discount the chains were getting, and I recognized Loose-Wiles biscuit. I did not want any better discount than the chains were getting. Some chains were getting a discount and explaining it was increased sales, bringing business, and so on. I could not see it at all. I said, if we could not get it, we would take a different kind of biscuit. It made no difference. We were not sold on shredded wheat. Theirs could be just the same. We preach to our stores that any prodnet recognized by the central office we think is something we ought to push. We picked out Kellogg's Whole Wheat Biscuit and took it in over a year ago. We tried it first and a second time and found an increase of 75 per cent. We said that was what we wanted, and we are sticking with it. That increase came from sales. I first generally box them in a pretty good column with six or seven leading items and a cut of Kellogg's Whole Wheat. Naturally, Kellogg's is put along the top. I have a cut on the side showing what the biscuit looks like. We say it is special for that week, two packages of thirty biscuit for seventeen cents. Sales of that type are effective in creating demand for the product. I have always found the demand for Whole Wheat Biscuit as a whole is being increased. I have built up a good business on it.

The members of my organization give the customers what they ask for. If they ask for Kellogg's Whole Wheat Biscuit, they get it. If a customer asks for shredded wheat, we tell him we do not have it, that our office recognizes Kellogg's Whole Wheat Biscuit and we should do the same thing. If he asks for shredded wheat, we say we do not carry it. That is all we say, as far as I know.

Kellogg's Whole Wheat Biscuit is whole wheat biscuit, shredded, or the same as shredded because. if you would ask me what shredded is, I do not know. It is shredded biscuit, Kellogg's Shredded Whole Wheat Biscuit. The only way to show the public is that cellophane package, the cut they had in it, showing what the biscnit looked like, what it is. We have packages with the cellophane front. It comes that way and came that way last year. I would not confuse the package of Kellogg's biscuit with the Niagara Shredded Wheat package, like Plaintiff's Exhibit 1. There is a whole lot of difference. All the Kellogg packages, including the Whole Wheat Biscuit packages are the same kind of package, with the same coloring. I have used the Kellogg biscuit myself. I also used the shredded wheat for some time. If you ask me which I prefer, Kellogg's suits me, so I am using Kellogg's. I do not handle any of the National Biscuit line. Their salesmen have not been calling on me. They ceased trying to make sales, because I do not recognize them at all. The First United does not recognize National.

The Kellogg Company co-operates every time in creating consumer demand for its biscuit. They furnish me window and store displays, and they do advertising, furnish store cards and advertising displays, everything in advertising. We have always had plenty of it and always got it into our stores. Those dealers use the selling helps of the Kellogg Company. We had a lot of them come in last year, and we sent them all out to our stores. They want them and use them. The Kellogg name on the Whole Wheat Biscuit is absolutely of benefit and help in selling the product, because all Kellogg products are well known, so they sell. We worked every one of our products the way I have described, everything we advertised, we went

to our stores, just put a display in their windows and in their stores, if they have the room, along to hook up with the advertising. We found through the store sales we had increased demand, and it is right in front of the consumer. When a customer comes in, she can pick it right up and place it on the counter.

We have handled the old Shredded Wheat Biscuit at times, in my own store. Out of three years, I can only remember handling shredded wheat trice at our ware house when there was a deal cn. When I was operating the retail store, four or five years ago, I have sold shredded wheat, at times. In my opinion, at the present time, Kellogg's Whole Wheat Biscuit sells faster than shredded wheat, and the present call or demand for Kellogg's biscuit is much greater now. Five years ago we had no voluntary chain, but, from checking with our stores, it is much greater than it was three years ago.

I was in the grocery business six years ago, before the voluntary chain was in. I purchased Shredded Wheat from the wholesale grocer then. There was never any advertising for it, such as posters, anless I made a sale myself. There was not a lot of sale on it. If I made a special, I bought maybe a case a month. In the retail business, on a special, I figure the average store, if he sold one case a week, he would naturally dispose of what he had the following week. Next week, he has to purchase another case and fill that space. He figures he is selling two to one.

When I have that same kind of sale on Kellogg's biscuit, I naturally sell more than in the old days, because then shredded wheat cost more than it does now.

CROSS-EXAMINATION.

THE WITNESS: There are four hundred and seventeen stores in our voluntary chain. I am the manager and purchaser of that outfit. I operate a wholesale warehouse for those stores. I purchase all the Kellogg biscuit that goes out to these various stores. We cover metropolitan Boston, but not outside. I do not say none of those stores has any shredded wheat at present. Our members are not forbidden to purchase shredded wheat or National products; except that, as their central office does not carry it, they do not carry it themselves, unless they have a fussy customer who wants a package of National shredded wheat biscuit. Then they will go to a store, pay cash for it, and deliver it. We do find some fussy customers who want shredded wheat.

Shredded wheat has been on the market many years, and I have known it for many years. I have been in the grocery business twenty-two years, and I have known shredded wheat all that time. Up to recently when we had this run-in with the National, I had carried shredded wheat and always had had it; but I have found, in taking on a line, the advertising put out by Kellogg makes a difference. Shredded wheat did not do the advertising that Kellogg's do. That is, they did not co-operate with the grocery stores at all. am speaking now of the old Shredded Wheat Company. They did very little national advertising. know they carried advertising in magazines like the Saturday Evening Post. How many retail grocers would you say read the magazines? The consumer reads the magazines. Sometimes, it would be some little pamphlet in the mail going with the package to the retail stores. That is what Kellogg has done with us. We have used Kellogg's Whole Wheat Biscuit to supplant shredded wheat in our stores.

I have had some dealer helps for Whole Wheat Biscuit that I have not yet had by the Shredded Wheat. Last year, they had the Wheel of Knowledge, which helped me sell the Kellogg product. I am not and

never have been using any premiums for shredded wheat, no blotters or little booklets. I have been twenty years on the one corner and I have never had them.

RE-DIRECT EXAMINATION.

THE WITNESS: That helped me sell at that time, when we had the sale. I think I made three purchases that week. Grocers in our voluntary chain sell the Kellogg biscuit two for seventeen cents when I run a sale. On a special we lower the figure to meet competition, price competition to meet loss-leaders some-body else is advertising. Where it is advanced to ten or eleven cents, if she did not purchase it that day, that is her hard luck. Eight and a half cents is selling pretty close to cost. The price on Kellogg's last year was a dellar-eighty and now a dellar-sixty something, which is why I could run it two for seventeen cents.

RE-CROSS-EXAMINATION.

THE WITNESS: We sell at cost to our members but hot to outsiders. He has to be a member and stockholder of the organization to purchase anything. When I buy Kellogg's biscuit at a dollar-sixty-seven, that is a special price only for that week. I get that from the Kellogg Company. If they have a special, they will have ten cases and one case free. I figure out the cost and that is how I give a special to our stores that week. It is a chance for us to make a leader of Kellogg's. I do not mean to say that, when a customer comes in the store and asks for shredded wheat, we just say we do not have it. We try to sell her Kellogg's shredded wheat. We try to tell her about it. We do not just tell her to go somewhere else, unless she insists on having shredded wheat. We have a weekly educational meeting for our stores once a week. I may get a good salesman from Arthur Rush for our meetings, to talk about various points and commodities. We do not instruct our salesmen to send a customer out empty-handed. We tell them to give her something just as good if they can. We would say that Kellogg's Whole Wheat Biscuit is better than shredded wheat. If we have not got Shredded Wheat, it takes the place of shredded wheat.

RE-DIRECT EXAMINATION.

THE WITNESS: Our men have different ways of saying it. One will say: "We do not carry regular shredded wheat but this Kellogg's Whole Wheat Biscuit, which we find a better kind. All Kellogg's products are best, in leading items. That is a staple and so we are carrying Kellogg's biscuit. We have a better demand for it."

RE-CROSS-EXAMINATION.

THE WITNESS: I recognize the package, Plaintiff's Exhibit 161. The reason that is so good a seller is they can see the biscuit inside and readily understand it is like shredded wheat. On the National, a thousanddollar-a-month scale makes the seven een and a half per cent. discount. They were insisting on that, and that they would sell us the biscuit; but they did not sell us the idea of the discount sale. No doubt, if four hundred odd stores, we would sell the thousand dollars worth or more a month and make that discount all right; but we just did not come to terms with the National and did with Loose Wiles. That automatically takes out the Uneeda Biscait and all the National line, including shredded wheat. Our members are at liberty, if they have a demand for shredded wheat biscuit or Uneeda Biscuit, to take the National line on. We do not prohibit that; but we want them to co-operate with the various companies that are cooperating with us. I came here today, because Mr. Rush, whom I know, called on me. I do not know Mr. John L. Kellogg.

RE-DIRECT EXAMINATION.

THE WITNESS: I recognize the cards, Defendant's Exhibits 89 and 90, one being the deal price on the deal basis, scaled off on the prices, showing the percentage

of a pool carloads, and so forth.

If we have a deal and sell two for seventeen, after that, the price goes to normal, which is about what the chain stores sell them for; but we have our stores competing with them, and we naturally like to have all our stores as uniform as possible. There is a general or consumer demand on it as a ten-cent product, and we stimulate that by lowering it from time to time. There has been an increased demand for Kellogg's Whole Wheat Biscuit in our stores.

DAVID D. KAY.

Deposition taken at Boston, Massachusetts, March 28, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a grocer. My store is conducted under my own name, one of the Home Circle Stores, a group of dealers banded together for their own advantage, co-operative advertising, and buying and selling co-operatively. They all buy at the same price and sell at the same price, the same week. Advertising material, circulated and so on, is prepared for us, with the space blank, so each grocer can put his own name in. If the majority feel something is worth while putting out that will pay them, they put it on the advertising circulars that day and get it started

I handle Kellogg's Whole Wheat Biscuit and have handled it about two years, when I first knew about it, when it came out with the new package. The other members of our group have also handled it. It has been the subject of co-operative advertising. We have had store and window displays on it. There is a good consumer demand at the present time for Kellogg's Whole Wheat Biscuit. I also handle the National shredded wheat, like Plaintiff's Exhibit 1. Kellogg's sells more, two to one or three to one of shredded wheat. The public does not confuse either one of those two products. I have never had an instance where one product was sent back with the statement they wanted the other.

I should say our consumers recognize there are two brands of whole wheat on the market, because some will call for Shredded Wheat and some for Kellogg's Whole Wheat. The people that have used shredded wheat have shifted from shredded wheat to Kellogg's Whole Wheat Biscuit, an advertised product of the Kellogg Company, which advertises it and puts its name on it.

I think I have done sampling of Kellogg's biscuit in my store. I have co-operated with the Kellogg Company in introducing that biscuit to the attention of consumers. Kellogg has given us samples and has sampled them at houses. We have advertised them on circulars. We give them store, window, and counter displays, and so on. It has created a demand for it. People seem now to recognize a difference between the two. There is no confusion in them. They seem to call more for Kellogg's than for Shredded Wheat. To my mind, there is quite a difference between the two. Shredded wheat is a large cake and kind of flat. Kellogg's biscuit is small and there seems to be more of a flavor to it. People have recognized that difference. I have used Kellogg's at home, had different people in

the house, and I use it in the morning for breakfast. People use it differently. I pour a little coffee over it, then milk and sugar. I have served it to my guests that way. They wanted to know what it was. They did not happen to be in a locality where they could get it, and three or four people spoke about how good it was.

We do not practice substitution in our stores, and you cannot do it nowadays, with the small community or neighborhood stores. A customer knows what she wants and, these days, she is going after it. If a customer asks for something I do not have in stock, if it were something I had never heard of, I would so state and would inquire to see if I could find out about it. If I thought it was something worth while stocking, I would get it.

If somebody asked me for National shredded wheat and I had none in stock. I would tell her so but that I had Kellogg's Whole Wheat Biscuit and ask her to try it. If she did not like it, I would refund her Customers, with me, ask for shredded the money. wheat and Kellogg's Whole Wheat Biscuit: I presume they have been educated to use those names in that way. They have always advertised them as Kellogg's Whole Wheat Biscuit. They ask for them that way. If a customer asked me for Kellogg's shredded wheat, I would naturally hand her a package of Kellogg's biscuit. I would tell her it was not shredded wheat but Whole Wheat Biscuit, put out by Kellogg's. I get the same price for both products, twelve cents, unless we run a special, when they are sold at ten cents.

I handle some of the National Biscuit line, but not all. Some of our group of stores handle some of the National Biscuit line of crackers and some do not, depending on their locality. There are several individually owned stores, which have to go according to whatever their neighborhood calls for. Some do and some do not. Some of them have not handled any at all.

Lots of the Whole Wheat Biscuit have been coming in cellophane-front packages, like Plaintiff's Exhibit 161. First we got a couple of them in a case, and then I have had cases with all cellophane-front packages. My own store has it on top of the shelf. I have shredded wheat in one place and Kellogg's right alongside, where I keep most of the time. If I run a sale, I generally put it in the windows, tag it, and put some tagged on the counter. I like the cellophane-front package. I think it is more attractive than the other. It gives a person a chance to see what they are getting, if they are not acquainted with it. It kind of dresses it up, to me. It lets the product speak for itself. I do not recall seeing any cellophane fronts in Niagara shredded wheat packages.

We get telephone orders in our store and make deliveries. We never had a mix-up between the two products on the telephone in our store. It is pretty hard to mix them today, because there is so much difference between the two products, it is hard work to get them confused. I know of no instances of confusion, because you get a large biscuit of shredded wheat. On Kellogg's, you have a different kind of end, package, product inside, different shape and size, and everything else. I cannot see any chance of confusion. A person might err in ordering. You cannot put anything over in that respect on the public today.

We have plenty of competition, not so much chain store, the nearest one being quite a little way from me. Competition is pretty keen today. I have not personally ever had any difficulties with the National Biscuit Company about discounts.

CROSS-EXAMINATION.

THE WITNESS: I do not find any other Kellogg varieties sold with a window in the package or bring

to mind any other cereals I have handled sold that way in that kind of package. I have handled and eaten shredded wheat for a great many years. The grocery business is about all I have ever done. I have been in it on my own hook about seven years, and in the business all my life. I have known shredded wheat all my life and used it in my house. It looks practically the same as I-dways knew it, as it was twenty-five years ago, very well known to the public, and always, to my knowledge, largely advertised, and always asked for as shredded wheat. It is only within the past two years or so that the Kellogg biscuit came along, and our customers preferred it and switched from shredded wheat. I do not think that is owing to the energetic sales efforts of the Kellogg Company. They have gone out and tried to bring it to the public. They have not hidden it away. They have gone out and pushed it. People have learned about it, liked it, and it has supplanted Shredded Wheat in a great many households in my territory, through superior quality. Many people liked the biscuit and more the flavor. have had to put force behind their sales to get it going. The thing that has kept them coming is the fact it is a superior product, a good product and people like it. Then they forget the old shredded wheat and ask for Kellogg's. Naturally, they ask for Kellogg's shredded wheat, and I have no doubt what they mean when they do, because, when a person has been accustomed to using shredded wheat for any time at all, it becomes second nature to think of it as shredded wheat. does not make any difference what firm made it. That kind of bischit is shredded wheat, the same as a can of condensed milk. It makes no difference whether it is Standard's or Borden's, or whose.

We have had shoulded wheat at home for the last twenty-five years, and we have switched to Kellogg's. We do not take shredded wheat in the home any more.

In connection with the sampling campaign, Kellogg's gave those samples away. They had a small container marked Free Sample, and they gave them out to the houses. I think the group has participated in a Kellogg forty-inch ad with a number of grocers coming in on it. I have not had any personally. My group is the Home Circle Stores, a voluntary organization, for the advantage of community buying. betterment of everybody concerned is in the air. You cannot do business alone. You have to get together. I do not do business with any other voluntary chain in the grocery business. I have meats, but I am in no other chain. Some of the other members of the Home Circle Stores Carry National shredded wheat and other National Biscuit Company products. I handle some National Biscuit Company crackers in addition. I think we get the maximum discount from the National now, 171/2 per cent. I get that right in my store, from the National Biscuit Company agency right in town. I must get it through the Home Circle. I am also a member of the Retail Grocers' Association. I do not know whether they get a discount from the National. At one time, I was getting extra discount. We could get it through two or three different ways, a wholesaler in town. We were doing business with Shaw's in Fall River. If I were buying from them, I could get a discount. I also did business with the Rival Foods in Boston, through whom I could get it.

There was some controversy between the National and some retailers about discounts, three or four years ago. At that time they asked them what they could do. They did not recognize them right away. They were tied up with National, but broke out. I could very well do without Uneeda Biscuit, but there was a demand for them. You could get your own throat

cut, so at times you have to do it, things you do not want to do.

RE-DIRECT EXAMINATION:

THE WITNESS: Fdo not try to substitute the other biscuit for Uneeda. I give the customers what they want. I get 10 per cent. on the National Biscuit. would not say where it comes from. I know our group tried some years ago to get that discount from the National. They said, if they would give it to the individuals, it would cramp them. It comes right off the face of the bill. I do not buy a thousand dollars' worth of goods monthly. The early dispute between the independent grocer and the National I was not linked up with, as I was not in business for myself. I cannot state definitely about it. From the drift of conversations I have heard, I should say it was pretty stiff. They had a little difference some three or four years ago, but nothing very severe. It was just a word or two, a little talk.

Many different things are transacted today so you do not know if you are getting them all or not. Sometimes you feel you are getting everything coming to you. Other times you see things cut badly and you wonder whether he is really losing money or has something up his sleeve that you have not. When they are selling something cheap, I think sometimes there is something wrong. That was always the dispute: that the independents did not think they were getting the same kind of discount as the chains.

RE-CROSS-EXAMINATION.

THE WITNESS: I do not know that I even saw shredded wheat sell at a price I could not buy it for. In days gone by, one fellow in town always sold shredded wheat for ten cents. I do not know whether that is exactly what it cost, but I always figured they

undertook to cut them eut. Shredded wheat now costs me somewhere about nine and a third cents a package. I bought a case of shredded wheat very recently. I should say there are probably a dozen packages of Kellogg's Whole Wheat Biscuit on my shelves today. I could not tell how long I have had them. I probably bought my last Kellogg's biscuit about three weeks ago.

RE-DIRECT EXAMINATION.

THE WITNESS: I have seen advertising of the shredded wheat at A. & P. two for nineteen cents within a month, nine and a half cents a package, about cost.

RE-CROSS-EXAMINATION.

THE WITNESS: I do not know that I ever saw the Kellogg biscuit advertised two for seventeen. Nothing would surprise me today. It would not surprise me to know that a witness today said they were sold two for seventeen cents.

MRS. BERTHA P. FOWLER.

Deposition taken at Boston, Massachusetts, March 28, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife with four in the house, one a son, nineteen, his sister, and a child. We use Kellogg's Whole Wheat Biscuit entirely as a cereal. We had formerly been acquainted with the National shredded wheat. We had for many years had the regular shredded wheat, as I call it. I prefer Kellogg's biscuit every time. My particular reason is I like the size, just right for serving, and the crispness. It has a little different flavor, a sort of nutty flavor. Another great help in my house, if I get up

late, I can serve Kellogg's biscuit directly from the package. I cannot do that with the regular shredded wheat. I have to put it in the oven and heat it to get away from the glutinous or kind of soggy, chewy taste. If I have shredded wheat, the family say not to serve it cold because they cannot eat it. It says on Plaintiff's Exhibit 1: "Heat the biscuit in oven to insure crispness." I have to do that to get away from the glutinous teste. You cannot do it in three minutes. It takes maybe ten. I do not have to heat the Kellogg biscuit at all, although I have heated it. I serve them with milk and sugar, sometimes with fruit in season.

I first became acquainted with Kellogg's Whole Wheat Biscuit when I got it at my grocery store. I told my dealer, Mr. Craft, of Arlington, if anything came along new to send it up and I would use it if I liked it. That is how we came to have it. I used a package, and it was always asked for after that. I ask for Kellogg's Whole Wheat Biscuit. If my grocer sent me anything new and I did not care for it, he would refund my money.

I came to testify today because somebody came to my door and asked me to come here. I never saw him before, and I do not know any of the parties to this dispute, did not know there was such a thing

CROSS-EXAMINATION.

THE WITNESS: I do not know how he got my name. I suppose it was from the grocer. I had been using the regular shredded wheat, like Plaintiff's Exhibit 1, twenty years or more. I had always used them and had been very familiar with the product for a long time. It was a well-known product. I had always asked for it as shredded wheat. It always came in a package like Plaintiff's Exhibit 1.

My grocer recently induced me to try Kellogg's biscuit. He sent it to me a couple of years ago. I tried it, liked it, and have been using it ever since, instead of Shredded Wheat, for the reasons I gave you. I have noticed in print on the side of the Kellogg package the number of biscuits and the weight; that is about all. I do not believe I ever noticed the suggestion on the back to split to sast them and serve with butter. I never tried to use shredded wheat any other way than just as a cereal. I take it out of the package, heat it in the oven, and put it on the table. When I do that, it is a crisp biscuit after ten or fifteen minutes' heating. I and my family used and liked it before we knew about Kellogg's biscuit.

RE-DIRECT EXAMINATION.

THE WITNESS: I had heard of Kellogg before I bought the Whole Wheat Biscuit. I do not recall using any of their other products. I am not in any way related to Ralph C. Fowler, 19 Suffolk Street, Medford, a witness here today. There is no connection between us. I do not know him. One Fowler is all I know. I know him well, and I know he likes his Kellogg's Whole Wheat Biscuit.

PERCY W. WITHERELL.

Deposition taken at Boston, Massachusetts, March 28, 1933.

DIRECT EXAMINATION:

THE WITNESS: I am treasurer of the Warren F. Witherell Company, cash-and-carry self-service grocers. We get some telephone orders. We handle Kellogg's Whole Wheat Biscuit, for which there is a consumer demand in our store. We have carried it since 1928. It was at first known as Kellogg's Shredded Whole Wheat Biscuit. It has been known as Kellogg's

Whole Wheat Biscuit maybe two or three years. Other names under which they ask for it are Kellogg's shredded wheat, Kellogg's wheat biscuit, indiscriminately. We deliver the Kellogg biscuit under any of those names. We have never had the Kellogg product returned by anybody ordering it under those names who said it was not what she wanted.

I was out of Kellogg's biscuit around the last of February for three or four days. One or two of my men came to me rather excited because I did not get it in right away. They said some people ask for Kellogg's and would not accept the other. They do not substitute in our store. We simply tell them we do not have Kellogg's and ask if they want the other. My customers would not take it. They said they wanted shredded wheat, Kellogg's. Of the two, Kellogg's sells more in our store, approximately two or three to one.

I have opened the packages of Kellogg's biscuit and seen the product physically. It is wheat that has been shredded and baked in the form of a biscuit. The old Niagara product is a similar type biscuit, the Niagara being a larger biscuit than Kellogg's. They are sold in packages of a different shape and color. We handle the Kellogg line. There is a recognizable family resemblance between the different Kellogg packages, such as corn flakes, etc. The Whole Wheat Biscuit package is in that family line of packages, in colors and general appearance. The name Kellogg's on that package is, in my opinion, very advantageous in the sale of the product, because of Kellogg's general reputation, especially corn flakes. People who had tried the others would take over a certain good-will with it.

I have never heard of a customer having a standing order with her grocer to send her new products. That is rather unusual. I offer customers new products that come out. It is more or less understood that, if she does not like the product, we will make a rebate to her on anything not very satisfactory. We would

make good.

We have a lunch counter and have Kellogg's biscuit in the little individual packages. We do not handle Niagara shredded wheat in the individual packages. Our customers seem to like Kellogg's at the counter in individual packages. I have been a consumer of Whole Wheat Biscuit, Kellogg's and have tried it. I had also been familiar with the other Niagara biscuit. As to taste, personally, I prefer Kellogg's. We also handle the National crackers, Wheatsworth Biscuit, cereal, and Holland Rusk. We get seventeen and a half per cent. off the bill. I do not pretend to say that is the maximum discount given. We doubt it, from past experience with them. We do not buy a thousand dollars worth of products month, but we get the seventeen and a half per cent. discount. We have not always gotten that in the past. I have had a great many discussions with them about discount. We thought it was unfair the chains should get a better discount than we. which was our opinion they did. In recent years, the National has given some discounts they refused to give us in former years. Not giving those discounts caused a great deal of dissatisfaction. I would say the acquisition of Shredded Wheat by the National hurt the sale of the biscuit very much.

We have kept a constant display on the counter for several months of quite a number of the cellophane-front packages of Kellogg's biscuit. It did a great deal of good in attracting the attention of customers. It was a good selling feature. We kept that particular counter display constantly for several months, last Spring, through last Summer, and quite a number of window displays. Those and floor displays are customary methods of introducing a new product to the

attention of customers.

I went to Worcester when the first Niagara shredded wheat machines were in operation, before it was on the market. I saw it at that time. I was a small boy. I know of other shredded products, like shredded coconut and shredded codfish, which are well-known products on the market. Shredded codfish is codfish that has been shredded up into fine shreds. Shredded coconut is simply the white ment of the coconut, shredded and probably treated with sugar. Since the introduction of corn flakes, they have outsold Niagara shredded wheat a great many times. Originally, there was nothing of that kind except shredded wheat. I think Maple Flakes was the first dry cereal after that. I think it took many years for shredded wheat to be properly introduced to the public for their consumption. It took them a long time to get going. I do not recall when Kellogg's flakes were just known as toasted corn flakes, but I think we ordinarily spoke of it as corn flakes, and then people commenced designating it as Kellogg's Corn Flakes. There were other brands at that time.

I do not think the entry of the Kellogg Company into the whole biscuit line has decreased the general volume of demand for that sort of product in any way. The increased sale of dry cereals in contrast to those which have to be cooked, has been very marked. There are so many different brands on the market, it is hard to say whether this type of biscuit has definitely increased or not. I am inclined to think it has. Much has been said about the advantages of whole wheat as a proper food, in national talks on health. I think that has helped the entire business.

Since the first introduction of the product, the Kellogg Company has, I think, succeeded in impressing that new whole wheat biscuit on our type of customer,

teaching them to ask for it.

CROSS-EXAMINATION.

THE WITNESS: No individual cereal has a very large or predominant sale with us. Since we commenced to buy Kellogg's biscuit, I think we bought three hundred and six cases. In that time, we bought a hundred and twenty-four of Niagara, thirty-six to a case, while Kellogg's is twenty-four. Before the coming of Kellogg's biscuit, we bought more shredded wheat because there was not any other kind, nothing else to buy. We bought the same quantity of it then, however, I cannot, without figures, explain how shredded wheat is still selling in the same quantities after the coming of Kellogg's. I imagine there was probably more of the Magara then, than is now sold. The coming of Kellogg's biscuit would naturally take some customers who had been using Shredded Wheat, Niagara. It was always known as just shredded wheat, I think, until Kellogg came into the field. It was known as shredded wheat, for years and years. There was also Ross' Biscuit, I recall, on the market a short time. The box was different, a red box of a different shape, but the biscuit was about the same.

I remember shredded wheat being made in Worcester many years ago. I have been active in the grocery business since 1899. Shredded wheat has been carried in that store all the time I have been active. The business has been going about eighty years, and it is one of the oldest grocery businesses in Massachusetts, right near the North Station. It is an old-line service and cash grocery store. We tried to swing over as much as possible to cash-and-carry. For many years, it was a service store; and, for many years, when ε customer called on the telephone and asked for Shredded Wheat, she got this well-known package I recognize. With the single exception of the Ross Biscuit, there was, I suppose, nothing else that would fill that order in all those years.

We think we can buy our Whole Wheat Biscuit as cheaply as the chain stores can buy them. We do not know anything. We get seventeen and a half per cent. off the bill. I deal with the Boston Wholesale Grocery to some extent. That discount is irrespective of the amount I buy, less than a thousand dollars a month.

We have not lately had counter displays of shredded wheat. There was never any profit, so there was no use in doing it. We make some profit on the Kellogg line. We sell both products at the same price, eleven cents. We sell Kellogg's biscuit in packages at the lunch counter. We do not serve the Niagara shredded wheat there. I know them both as shredded wheat. If a customer asks for shredded wheat, I do not know which she wants, now, I suppose. I really have to ask her which one she wants. We do not serve National Biscuit shredded wheat at our lunch counter. We might, if somebody asked for it. We have, at times; but we do not have the individual package of that biscuit.

We have had disp. ys of Kellogg's Whole Wheat Biscuit but never a demonstration in our store. We never gave away a package of Kellogg's with a deal

of Kellogg products.

We used to use the National Biscuit shredded wheat at home and had it for a great many years. When I tried the Kellogg biscuit, it pretty largely supplanted the old shredded wheat. We have practically nothing at home but Kellogg's now.

RE-DIRECT EXAMINATION.

THE WITNESS: If I remember it correctly, the Ross whole wheat biscuit was in a red carton. I have seen a carton like Defendant's Exhibit 91 before. It looks like the Ross Biscuit carton, and it is so labeled. It looks like my recollection of it. I do not believe I handled it. It was shown to us and we expected to handle it. For some reason we did not get it.

MRS. BEATRICE KELLY.

Deposition taken at Boston, Massachusetts, March 28, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, with my husband and daughter in the household. We are consumers of Kellogg's Whole Wheat Biscuit, having used it about a year. I was in the store one day looking for a new cereal. I tried it, because I always try all Kellogg products. I saw it there and it attracted my attention. From the picture on the box, I knew it was a biscuit. I bought some of it. I had never used the National shredded wheat biscuit. I liked the Kellogg biscuit very much, the flavor, crispness, etc. I have never tried any other biscuit. I am satisfied with this.

CROSS-EXAMINATION.

THE WITNESS: I had seen shredded wheat before but had never tried it. I may have seen their ads and displays in stores, but I never paid any attention, because I always buy Kellogg products. I like them very much. When I saw Kellogg had something new, I tried it.

EUGENE S. BOARDMAN.

Deposition taken at Boston, Massachusetts, March 28, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am manager of the supply department of Field & Coles, insurance. I am a consumer of Kellogg's Whole Wheat Biscuit and have been for all of two years. It first came to my attention when I went into Witherell's, on Portland Street, and asked for a package of shredded wheat.

He said, "Kellogg's or Niagara Falls!" I told him I did not know there was more than one kind. He said, "We have Kellogg's." I said, "All right, I should like to try it." I used it, and I have used it since. I like it very much better than the other. I came here to testify, because someone asked me about this case. The last time I went to Witherell's, they did not have Kellogg's but said they would have it Monday. My wife used Scotch Oats and asked me to get some Kellogg's shredded wheat. I got it yesterday. I came out of Witherell's last night in a hurry to catch my train. A voung man, Mr. Hurd, stepped over and asked me if I just bought a box of Kellogg's. I told him yes and I had been using it. He asked why. and I said it was because I like it very much better than the other. He said they were threatened with a suit, so Lyave him my name, address, where I live and where am employed, and started for the train. I got to thinking afterwards I had not treated that salesman politely. I used to sell. I called their office this morning and said, if I could do anything, I wanted to help. I wanted to buy the Kellogg Biscuit. It was not that I knew Kellogg's or this salesman.

CROSS-EXAMINATION.

THE WITNESS: I do not know Mr. Rush. I have not the least idea who he is. It just happened accidentally, as I told you. I had been using shredded wheat for years and years, I guess ever since I can recollect anything. That is about the only product that did not change its price during the war. I recognize the package, Plaintiff's Exhibit 1. I have been to Niagara Falls and seen the factory. I never was through the factory. At any rate, I have been using that for many years, probably twenty or thirty. It is pretty safe to say it is a household word, just like the old Arabian Balsam. My mother would not be without it and would

not permit us to be without shredded wheat. She had gotten that for thirty or forty years. It was thirteen cents if I remember right, during the war.

Some time ago, when I asked for shredded wheat at Witherell's, they called my attention to Kellogg's shredded wheat, and I liked it better; so I switched over from Niagara shredded wheat to Kellogg's shredded wheat. I go there now and ask for Kellogg's shredded wheat, referring to this Whole Wheat Biscuit. We traded with Atkinson, in Reading. The last time I asked, he did not have Kellogg's. I used to get shredded wheat, and now I have become a Kellogg fan instead of a shredded wheat fan. Do not forget the bananas that go with it.

MRS. CATHERINE C. HANEY.

Deposition taken at Boston, Massachusetts, March 28, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a user of Kellogg's products, including Whole Wheat Biscuit. I have used it since Mr. Burroughs brought it, about a year ago last month. I use as many Kellogg products as I can. I have used the National shredded wheat. It is a longer biscuit. In making my choice, I am always interested in advertising products, because my line is advertising. In choosing that, I made up my mind I prefer Whole Wheat, because it is smaller, and, for my particular interest, I do not leave any on the plate. I have continued using it since as much as I wanted to. I vary my cereal every morning, sometimes exting Educator Crackers. I used the Kellogg biscuit sometimes.

CROSS-EXAMINATION.

THE WITNESS: I have known shredded wheat a long time, because they were advertisers of it. I am in the

advertising business, and one of the gentlemen in our office covered New York City. I was his secretary, handled a lot of the copy, and know the product. I know shredded wheat has been extensively advertised and was a very well-known product for many years. They spent a lot of money advertising it. It was just a question of size and of fitness of the biscuit for me. I had used shredded wheat. It was served to me once or twice, but, for my own use, I prefer Kellogg's Whole Wheat Biscuit. In the old days, not having the Kellogg biscuit, if anybody wanted that kind of biscuit, he had to take shredded wheat. It was the only one but not the one I would have chosen. When Kellogg's biscuit came. I took it because I liked it better for my purposes. I use Kellogg's biscuit now, as it is my favorite. I no longer use shredded wheat, I think. If it were served to me when I was visiting outside. I would not refuse it. I prefer Kellogg's because of the size.

I came here today because I know Mr. Burrows in their organization. I work once a week or so for him. I hope they will be one of my accounts. I was with Mr. Burrows with the National Sportsman advertising staff. He worked very hard with me, and I was very appreciative of the creative work he tried to do. I came to see him, made inquiry for him, and they asked me if I would tell what I know about the biscuit, while I am here. I am very glad to.

RE-DIRECT EXAMINATION.

THE WITNESS: I never had business relations with the shredded wheat company at all. I do not have with Kellogg nationally. I did national work before. The National Sportsman is a national publication and they solicit national accounts. Now I am in the direct-mail line locally, I have only local accounts. As far as I am aware, my testimony has not been colored by friendship for either company. I have just given you the facts, as a consumer of the two products.

MRS. ELEANOR AGNES WILKES.

Deposition taken at Boston, Massachusetts, March 28, 1933.

DIRECT EXAMINATION.

THE WITNESS: I keep house, with my mother and sister. We are now consumers of Kellogg's Whole Wheat Biscuit, having used it about eight to ten months. I had been using shredded wheat, but it got stale so long that I was disgusted with it. I went in the Deapness Market one day and saw this other new biscuit, ate it, liked it, and have used it ever since. I also use their Pep. I like their other products, but I do not care for corn flakes.

Kellogg's Whole Wheat Biscuit is small, just convenient for me. I like it in the morning. It was fresh when I happened to buy it. The National Shredded Wheat was very stale. I have bought it many times in the summer when you would think it would be fresh, and it was not.

CROSS-EXAMINATION.

The Witness: My mother used shredded wheat off and on four or five years. We do not eat it regularly. It was a well-known product for many years. We had it off and on at home, and it got stale many times. Then we came across Kellogg's biscuit, which seemed better and tender. I happened to know I could use Kellogg's biscuit instead of shredded wheat, because I saw it on the table in the Deapness Market and tried it, just as you see it now. It was in a package, two biscuit in the package, with a picture of two biscuit in a dish, I mean, something like that on Plaintiff's Exhibit 161. That attracted my attention, and I saw it was something I could use instead of shredded wheat. I have not bought any more shredded wheat since. I bought Kellogg's.

RE-DERECT EXAMINATION.

By MR. CLARER:

RDQ. 23. Mrs. Wilkes, by shredded wheat what did you understand Mr. Vilas to mean! He asked you whether you have used shredded wheat. What kind

of product is that?

A. Well, it is a biscuit. It is a larger biscuit than what we are using now, and it seemed to me to be, if I might use that word, tougher. I do not know whether that is the proper word, but I like this other biscuit much better.

ALFRED B. CRAFT.

Deposition taken at Boston, Massachusetts, March 28, 1933.

DIRECT EXAMINATION.

THE WITENS: I am a market man, running my own store under the name Craft's Market, since March first, formerly Brown's Market. I have been connected with the grocery business twenty-two years and with this store three years. We carry Kellogg's Whole Wheat Biscuit and have ever since we opened, about three years ago. There is a consumer demand in our store for that product.

We also sell the other shredded wheat made by the National Biscuit Company. The sales of the two products are about equal, fifty-fity. We have featured Kellogg's Biscuit. Twice a week we run specials, and we featured it quite often then, with window and store displays. The one that made the most sales was a display with the open front, showing the biscuit. The other day, a lady from Hartford, Connecticut, said it was hard to find, that she had tried in several places. Then she saw it in my window and came right in. She was in several stores in Arlington trying to find it. She wanted a regular package, but she saw the open-front packages in my window.

We find no confusion in our store between the Kellogg biscuit and the Niagara shredded wheat. I never had a customer return either and say it was

the other she ordered or wanted.

Customers usually order them by the name of Kellogg's Whole Wheat Biscuit. If a customer should ask for Kellogg's shredded wheat, if I were taking the order myself, I would not leave it that way. I would want to find out whether she wanted shredded wheat or Kellogg's Whole Wheat Biscuit. I would ask her. One of our rules is that we ask. I suppose another clerk might not. I always ask what she wants, when I take an order. I do not recall anybody ever asking for it as Kellogg's Shredded Wheat. Aside from specials, we sell both products for the same, eleven cents a package, unless there is a special sale on.

We handle the National Biscuit line of crackers and cakes. We are a B. W. G. Store, Boston Wholesale Grocery. We get 171/2 per cent. discount on National goods through the New England Stores, irrespective of whether we buy a thousand dollars worth a month. It is taken off every bill, whether it is one dollar or ten or twenty, at the time we purchase. We did not always get that discount from the Nationalperhaps in the last year and a half. We had at that time four stores and bought enough for the four to get twelve and a half or fifteen. The chain stores were then getting seventeen and a half. There was some dissatisfaction among the independent retailers because of that. We always felt a combination of grocers should have the same discount as chain stores. We were unable to get it from any of the biscuit companies until recently. We get it now from either Loose-Wiles or National. We are a service store, making deliveries, extending credit to a certain amount where it is justified, and two-thirds of our business

comes in by telephone.

We handle Kellogg's Kaffee Hag, Pep, Rice Krispies, Corn Flakes, as well as Whole Wheat Biscuit. The name of Kellogg on that line is of great value as a selling medium on new products. I introduced Kellogg's Kaffee Hag lately and found Sanka Coffee better known in that territory. When I told them Kellogg made it, it seemed to sell much easier. The name seemed to carry a certain guarantee. At home I have used the Whole Wheat Biscuit in the summer time. There are three people in our immediate family. The whole family enjoys Whole Wheat Biscuit. We formerly used shredded wheat. I myself prefer Kellogg's Whole Wheat Biscuit. I have not had a package of shredded wheat in the house since I first tried Kellogg's Biscuit.

CROSS-EXAMINATION.

The Witters: I used shredded wheat at home and have known it for many years. It is one of our old cereals. We have used it for years. It was one of the old standbys for grocers. I do not think we ever sold it for ten cents. Now that you speak of it, I remember Shredded Wheat Company had it for ten cents, and, when National took if over, they put it up to eleven. I can make a little profit on it at eleven cents. Kellogg's Corn Flakes at seven cents is one of our best cereals. We make a profit on it. Regularly we sell them for nine and sold them last week two for fifteen, at a profit. There are quite a good many sales of Kellogg's Corn Flakes. It is quite a popular leader. I do not know that Kellogg's biscuit

has supplanted shredded wheat among our customers in a great lot of cases. I think it has a good deal in some cases, but much of it has been built up itself. We sell almost as much shredded wheat as we do of it. We have some customers who have switched to Kellogg's. I am one myself. There have been some; but it is among a lot of new brands. In the twenty and more years I have been in business until Kellogg's biscuit came on the market, there was only one product of that particular type. I remember having Ross' Biscuit several years ago, somewhat similar; but it did not go across. I had one case of Kellogg's Wheat Flakes at one time. I got rid of it, but it was a slow seller. It seemed to be one of those things that did not take. Wheat Flakes were not so popular. Wheaties was the first popular one.

When I say there is no confusion between the two in our store, the packages are altogether different. When our customers come in and ask for Kellogg's shredded wheat, I ask them what they mean, to find out which they want and avoid any confusion. That is what I have in mind, because, when people ask for Kellogg's shredded wheat, there might be some confusion in their minds. They might want Kellogg's Whole Wheat or shredded wheat. I am not sure, so, in order to avoid any question, I ask them. The same is true on telephone orders, the same as if they ordered round steak. They might order rump or porterhouse.

I would not say they never have asked for Kellogg's shredded wheat. That might have happened to us, and it might have happened over the telephone. I never heard a woman refer to it that way. We do get orders for shredded wheat over the telephone, and we know what they want. That is what they have been ordering for a great many years under that name.

RE-DIRECT EXAMINATION.

THE WITNESS: Defendant's Exhibit 91 is the Ross package I referred to, which I have seen. It was on the market a while. We had one lot of it, but it did not seem to sell. It was quite a few years ago.

JOHN E. TORPHY.

Deposition taken at Boston, Massachusetts, March 28, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am in the grocery business and have been for thirty-five years. I carry Kellogg's Whole Wheat Biscuit, for which there is a consumer demand in my store. I have heard comment from people who buy them that the small biscuit is just enough for a child with no waste. Sometimes they say two are just nice for their families. Other times, they say they like Kellogg's goods because they keep them fresh and all their other products are nice, so they know this must be. I always have four or five packages National shredded wheat on hand. Before, I used to have trouble because they were so long on my shelf without changing, and they became wormy. Kellogg came along, took care of their goods, their windows, and everything, and created a demand. They come into my store and pick Kellogg's in preference to National shredded wheat. They have confidence in my opinion of the goods. I sell a full case of Kellogg's biscuit to four packages of shredded wheat. That is how my trade want it.

My trade ask for the Kellogg product by saying, "Give me a package of Kellogg's wheat biscuit." They come in and pick it right up. In my opinion, the



only people I sell Shredded Wheat in my store are relatives of Kenny, salesman for the National. They seem to pick his goods, come in and take his packages. I suppose he might have asked them to do that. The general trade will take Kellogg's Corn Flakes, Rice Krispies and Kellogg's shredded wheat and will go off satisfied, without any ballyhooing. So in my store, I think the demand for the National product has dwindled to relatives to the National man. I would not want him to feel I noticed it. It might hurt my business to make that statement. Some of his relatives come in my store, and, when they want a package of shredded wheat biscuit, take his. I do not tell them what to take or say a word. The general trade want Kellogg's.

I have not experienced any confusion between the two. I have never had anybody buying Kellogg's send it back and say they wanted the other kind. I have seen people send back the National brand and say it. was Kellogg's they wanted. It happened yesterday afternoon. A little boy from up the street, Ahrens, came in and said to my girl: "A package of shredded wheat biscuits." She delivered it, and he came back and said. "My mother does not want this. She wants the other one." It makes no difference to me. I am only here to tell you the truth, as I find it in my trade. I am not co-operating with the Kellogg Company any more than I have been with the National Biscuit Company. I have not advertised. I give both products equal displays. The National Biscuit man works very hard to put them in your store. He put in two packages and said to let him put in enough so I could keep a couple on hand to help him out. He said he was supposed to have distribution around all the stores.

I have not been buying shredded wheat for a long time. He put in four boxes on consignment. His

manager expects him to make a showing, and I permitted him to put in four without really buying them. I would not handle them at all. It was on account of Tom himself. He is a pretty good kind of fellow. His relatives are around there. He probably put in a few packages for them; but my trade is entirely Kellogg. I am a consumer of the Kellogg product. I had sometimes been a consumer of the Niagara product before. I certainly prefer the one I am using now.

Some time ago, before National took it over, it would be in the store as long as I liked to leave it there, until I sold it. In hot weather, they would get grubby. I used to put them out, and it caused a lot of dissatisfaction in my trade. As long as the Kellogg people have put out theirs, it seems I have never had a complaint. When I opened them at home, we always felt they are fresh, because we use a lot of Kellogg products. I guess everybody does today. They have nice goods. People will think that, as everything else is nice, Shredded Wheat must be all right, too. They both sell at the same price. I get twelve cents for mine.

CROSS-EXAMINATION

THE WITNESS: I have no chain-store competition near me. There are chain stores in Fall River which sell shredded wheat for eleven cents. They do have Shredded Wheat. I do not know if they have Kellogg's. I am in a kind of exclusive section, up on the nighland. It is a zoned district. I am alone. I operate a service store, have telephone orders, and so on. We carry some of the National products, crackers, and so forth. I have always had them. During thirty-five years, I have carried shredded wheat biscuit. It was a well-known product during the time I have been in business. I have always had it on hand.

During all the time it was on hand, I knew it as shredded wheat. I knew what they meant when they called for that, and that is what they asked for. There was a time when Shredded Wheat Company transferred its assets to the National Biscuit Company. Then I did not carry shredded wheat, any of it. I had the Kellogg product. To the extent my customers were interested in that kind of product, it supplanted shredded wheat biscuit. They called for shredded biscuits, and I had them there. They sometimes asked for shredded wheat. That is what they call them. As a rule, they call them shredded wheat biscuit. They put Kellogg's on and call them Kellogg's shredden wheat biscuit. We have people ask for shredded wheat and ask the customer what kind she wants. She will say she wants this package or that package. Whichever she points to, I will take it. I have four packages shredded wheat. I always had a case of Kellogg's. right on the shelf with the others. Some of them have the cellophane front. They are now featuring the geography chart as a premium with two packages. That is a very good selling point and makes it move. Lawyers in town have called me up and asked me to send over a couple of packages to their home, to get that chart. It is quite a thing.

I am friendly with the Kellogg people. There is a nice lot of fellows there that come in and take care of my windows and seem to be nice. The National Biscuit Company gives me no service at all. He just wants to get it in there to have it to sell. There is nobody to help you do anything else. I carry maybe eight or ten of the National Biscuit crackers. I usually use the Alantic at Providence, because the Home Circle stores are linked up with them. I am a member of that. I get a discount through those stores on my National goods, not through the Economy Grocery Com-

pany. I just buy a few there. I belong to them and am supposed to buy more from them, but I have always been a high-class store. I feature their goods but do not stick to everything.

I cannot tell you how long it has been since I had the National shredded wheat in my house. I never bring it home. I used to a long while ago, but now I use all the Kellogg products in my home.

MRS. MARY G. MILLER.

Deposition taken at Philadelphia, Pennsylvania, March 30, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, and my husband is not working and is home with me. I also have a son and daughter, four in the house altogether. We are all consumers of Kellogg's Whole Wheat Biscuit. I have used that product almost two years, since it first came on the market. During that time, it has been known as Kellogg's Whole Wheat Biscuit, under which name I order it.

It first came to my attention through a sample at the door It was a hundred per cent. to me. I ordered it right from them and have continued to use it. If my grocer sends the other, I return it. He can verify my statement. If he sends Niagara shredded wheat to me, I return it to him.

I like Kellogg's biscuit, because it is better roasted, much better flavored biscuit, very firm and crisp. There are fifteen Kellogg's biscuit to the package and they are smaller biscuit. I noticed that when the sample came to my door. Since I had the sample delivered, I have continued to use Kellogg's. We have it every morning. We use it for breakfast, a biscuit and a cup

of Kellogg's Bran, except Sundays, when we use Kellogg's Corn Flakes. Kellogg's name on the package means quality, which is what counts with me, what I am looking for.

CEOSS-EXAMINATION.

THE WITNESS: I know about this old shredded wheat. I have seen packages like Plaintiff's Exhibit 1 and used it. I have known about it for a great while. It is one of the old staple foods. My husband used cooked cereals before Kellogg's, but I should say three or four years before I knew Kellogg's biscuit I knew shredded wheat. I have used it off and on for some time. I would say I have known it longer than a few years. I have not been housekeeping as long as twenty years. Somebody left the Kellogg biscuit at my door and I sampled it, liked it, and have continued to order it at my grocer's. Since that time, I have not ordered any shredded wheat. It has taken the place of shredded wheat on my shelf partly, but I used a cooked cereal before. Where I formerly used shredded wheat, I now use Kellogg's biscuit. I would not use the other, now. I would never ask for Kellogg's shredded wheat. I am very careful to specify Kellogg's Whole Wheat Biscuit. I came here today because a gentleman asked rae, somebody I do not know connected with the Kellogg Company. I suppose he got my name from the grocer. I buy my biscuit at Mr. McCorkle's, in Collingswood, about three miles from Philadelphia, in New Jersey, across the river. I was willing to come down here to tell about it, because I was coming to town. Mr. Mc-Corkle knows I never bought anything but Kellogg's, because I am satisfied with it. I do not expect the Kellogg Company to pay my/ expenses. There was not much expense to it. I was coming to town anyway.

RE-DIRECT EXAMINATION.

THE WITNESS: I have not asked anything for expenses. I have asked for Kellogg's Whole Wheat Biscuit; they sometimes sent the other one, the old shredded wheat. I returned it, because my family would not eat it. I returned it to the grocer.

MRS. WILLIAM T. WESCOTT.

Deposition taken at Philadelphia, Pennsylvania, March 30, 1933.

DIRECT EXAMINATION.

THE WITNESS: I have an apartment, just my husband and myself. We are both consumers of Kellogg's Whole Wheat Biscuit and have used it about a year and a half. Mr. Hall, the Quaker Store dealer, said it was a new product which he would like us to try. We did and have used it ever since. He is our grocer, at the Quaker Store. We always used the other biscuit before. We prefer Kellogg's. They have a sweeter taste, browner, and I think they are more tasty. Shredded wheat is a larger biscuit. I order the Kellogg biscuit just as Kellogg's Whole Wheat. A strange grocer, if you speak of them, will try to send you the others. I usually send them back and say we do not want them. When they do not have Kellogg's we will wait until they come. Sometimes we send it back by the boy. If you try to take them back yourself, they will try to stick them on you. I came here today as a witness because their representative came to us, some man I had not met before came to my door.

CROSS-EXAMINATION.

THE WITNESS: He probably got my name from a grocer, said he was a Kellogg representative, and asked me if I liked Whole Wheat Biscuit and if I would come down and tell about it.

The first time I saw Kellogg's Whole Wheat Biscuit, I was in the grocery store, buying shredded wheat, that day, and he asked if I ever saw the other. He said it was the same thing and induced me to buy it. I liked it better. Since then, I have not used any other.

I have known the old shredded wheat several years. Plaintiff's Exhibit 1 has been very familiar to me for many years. I do not know whether the box has been changed or not. I have always known it by that name, and I have always asked for shredded wheat. On this day the grocer showed me the Kellogg product, I had asked for shredded wheat. He said he had Whole Wheat, a new product of Kellogg's. He did not say anything about shredded wheat. He just said to trye them and see if we did not like them better. He showed me the box, which was like this panel in Plaintiff's Exhibit 161. It did not have a window in it then. It was jasta box, with a picture of the biscuit in a dish on each panel. Ever since that time, I have used Kellogg's biscuit instead of shredded wheat. Since then, whenever they sent me shredded wheat, I have sent it back. If you go back yourself, they always try to argue you into it, but I always wait until the other comes in. I ask for it as Kellogg's Whole Wheat, not as Kellogg's shredded wheat.

EWALD GROBEL.

Deposition taken at Philadelphia, Pennsylvania, March 30, 1933.

DIRECT EXAMINATION.

THE WINNESS: I have a restaurant and cafeteria, the Fourth Street Cafeteria, at 129 South Fourth Street. There are twelve of us in all at present. We handle Kellogg's Whole Wheat Biscuit. There is a cafeteria railing, and we have it all on the counter,

each one in a bowl, in a container, the little individual carton. When the customers pass by, they pick up whatever they see. It is in a container like Defendant's Exhibit 80, put in the bowl, but not opened. The customer opens it himself. If he desires, we open it for him.

Some years ago, we had another product in the biscuit line like this. We do not handle the other one. I saw it once in another store. I liked it a whole lat better, because that was two in one. The other product came in a larger package, like Plaintiff's Exhibit 1. We do not sell the other lind, because, after it was opened and standing around a while, it was not right. When I saw Kellogg's, I liked them better and put them in, myself. I bought them through some jobber on order. We have not gotten any for at least a month.

I never had a customer complain about not being able to get any other biscuit than Kellogg's. We have corn flakes and several other Kellogg cereals. We do not get an assorted case. Sometimes, the Kellogg's salesman stops to see if everything is all right, whether we are serving them right. They get the products for us through the wholesale grocer. We handle the National Premium Saltines, and Wheatsworth, and Uneeda, in small packages. I get them direct from the National bunch at Glenwood Avenue. Once in a while, the National salesman steps in to see how everything is. They do not come in as often as the Kellogg men.

I have tried the Kellogg Biscuit, as I try everything that comes in my place, whether I like it or not. I do not care for any of that stuff, even with fruit. I would not say that Kellogg's biscuit is any worse than any other. Whole Wheat Biscuit with cream in our cafeteria is ten cents.

I absolutely prefer to handle those biscuit in the individual size rather than the big size, either that bis-

cuit or the other. I think the customers like it better. My largest cereal seller is Corn Flakes. That is also serviced in our restaurant in the individual containers. All the breakfast food is handled the same way.

I have been in this particular business about ten years this December. Before that, I was in the saloon and restaurant business. When prohibition came, I got out.

CROSS-EXAMINATION.

THE WITNESS: We sometimes give an order to the Kellogg Company and they deliver it through the jobber, Mr. Salus. I have been ten years this December in this cafeteria. We have twelve people there altogether. We do not serve many at breakfast now. Lunch time is the biggest time of the day. For many years, we carried shredded wheat like Plaintiff's Exhibit 1. I had to take it out of the package and put it in the dish for the customer. We always had Shredded Wheat on hand before I saw Kellogg's biscuit. It is safe to say that I have been familiar with shredded wheat for many years, probably before I went in the cafeteria business; but I would not have heard much of it before that. I knew of it, had heard of it before. and had visited the factory up there. That is all I o know about it. I do not eat it. I was not aware of the fact I could get shredded wheat in the individual package, like Plaintiff's Exhibit 21. I never heard about that. The National salesman did not tell me I They may have been around when I was not in. I see that package now, somewhat similar in size and shape to the Kellogg package Mr. Clarke showed me. I know now I can get the National shredded wheat in the individual package.

I first saw Kellogg's biscuit like Defendant's Exhibit 80 in one of the stores, a long time ago. When I first saw it, it struck me that here was something

like shredded wheat, which I could get in the individual package, so I started to buy it and ceased to buy shredded wheat. The gentleman came in, saw my customers, and sold me Kellogg's shredded wheat. I have used it to the exclusion of shredded wheat since then. I have no menu. I just set a carton of it right out on the counter, as they go by.

MRS. WILLIAM C. STOKES.

Deposition taken at Philadelphia, Pennsylvania, March 30, 1933.

DIRECT EXAMINATION.

The Witness: I am a housewife. There are two of us, but my dog eats this, too. He loves them, eats two every morning. Sometimes I only eat one myself. I refer to Kellogg's Whole Wheat Biscuit. I have used them in my household about a year and a half. It first came to my attention when I went over to the Quaker Store at the corner. Mr. Hall said I might try it, so I took home a package. All I used to get was like Plaintiff's Exhibit 1. Whole Wheat is what I am using now. I order them as Kellogg's Whole Wheat. One time he was out of it and said he had the other. I said I did not care for the other. I like the size of these, think they are a better flavor, not as coarse. I have been using them since. My husband and my dog also like this biscuit.

My dog has tried the other biscuit. I got them before these came out, a year and a half ago, since Mr. Hall first told me about it. I am here today because Mr. Hall gave my name to a man who came to see me. I never saw him before he came to my door.

CROSS-EXAMINATION.

THE WITNESS: I used shredded wheat a good many years before Kellogg's biscuit came out. I have known

shredded wheat pretty nearly all my life. When I was a little girl, my mother and I took a trip to Niagara Falls. I think my brother went through the factory, but I did not. I remember seeing the Home of Shredded Wheat up there. The name shredded wheat has been familiar to me for several years. When I started housekeeping. I was familiar with shredded wheat. I had them until Kellogg's biscuit came out, but I never got them afterwards. I never bought it again. When I learned about Kellogg's biscuit, I was in Mr. Hall's store shopping for Shredded Wheat. He said, "Here is this. Would you like to try it?" I took it home, tried it, and liked it a lot better. From then on I stopped getting shredded wheat, never bought it any more. Kellogg's has taken the place of shredded wheat in my household, including the dog. I cannot say whether the dog likes Kellogg's better. He used to eat shredded wheat, but he eats everything, except he will not eat canned spinach.

MRS. WALTER GRIMM.

Deposition taken at Philadelphia, Pennsylvania, March 30, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, with my husband. We are both users of Whole Wheat Biscuit, a Kellogg product, like the package, Plaintiff's Exhibit 161. I have used those about a year and a half. It first came to my attention through a niece of mine. I had shredded wheat biscuit, like Plaintiff's Exhibit 1. She told me of Kellogg's biscuit and said she liked it better. I said we would try it. After we did, I liked it better, myself. I have continued to use it. It is more toasted, I think, and there is a better flavor to it.

Since I began eating Kellogg's biscuit, I tried shredded wheat biscuit again. I went to my grocer for Kellogg's and they did not have any on hand. It was off the shelf, so I took one of the shredded wheat. When I asked for Whole Wheat, my grocer said he had shredded wheat, would I take it, and we said ves. They had Kellogg's in stock, but it was not vet unpacked. I tried shredded wheat. My reason for having Whole Wheat, Kellogg's shredded wheat, is that I have a dog and I feed him a wheat biscuit every day. He would not est shredded wheat: I went to the store later, got the Whole Wheat, after it was on the shelf again. He ate that. I had to eat the other myself. but I do not care for it like I do Kellogg's. I will not buy any more shredded wheat, as long as I can get Kellogg's.

I came here as a witness today because some man who was referred to me by Mr. Bausher, my grocer, came to my door and asked me to come here today. I did not know who he was.

CROSS-EXAMINATION.

The Witness: Before I knew about Kellogg's biscuit, my niece and I used shredded wheat. When I tire of it, we use it off and on, and then we shift. I have known shredded wheat, like Plaintiff's Exhibit 1, and have known it for a long time. It has been known to me for many years. I have known it a long time. We have been eating it quite a while. I did not have my dog before I knew about Kellogg's. He will only be two years old in June. He will not eat shredded wheat at all. The dog is the fault of that. He would get shredded wheat or get something else. We really buy Kellogg's biscuit more for the dog than for the family. I really like the dog more than myself.

It was several weeks ago that Mr. Hopkins, of the Kellogg Company called at my home, back in January, I think. That was the first time I knew Mr. Hopkins. He asked me whether I would come if there would be any occasion. They later arranged I should come down from Reading today. They did not mention paying my expenses, but I figure on that. Reading is sixty miles away from Philadelphia. I came by machine, my own car.

I told Mr. Clarke that a friend of mine with dog kennels started the dog for me on loose shredded or crumbled wheat, which they buy by the pound. My dog will not eat that. He is very particular. He has to have Whole Wheat Biscuit. My niece first told me about it before I got the dog. Through her I switched from shredded wheat to Kellogg's biscuit.

I have a cottage along the shore. In summer it is damp along the water. Kellogg's biscuit stay crisper there than shredded wheat does. In putting milk on Whole Wheat, I find they keep more crisp than shredded wheat. When school stops, my niece comes to me and stays until school starts again. I had a box of the old shredded wheat down at the cottage. She said, "Aunt, I do not like this. I like Kellogg's." I said I did not know they had put out any Kellogg's shredded wheat, and she said they did. We are eleven miles away out in the country, and my husband went to one of the Keystone Stores in the city and got Kellogg's, and we have used it since. My niece told me it was something like a shredded wheat biscuit. She called it Kellogg's Whole Wheat Biscuit. Mr. Bausher is a Keystone grocer, the man I am dealing with.

MRS. MARY E. KEENE.

Deposition taken at Philadelphia, Pennsylvania, March 30, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, with just my husband and I in the house. He is an osteopath. We

are users of Kellogg's Whole Wheat Biscuit, having had it more than a year. I do not recall how we first became acquainted with the biscuit.

I have used shredded wheat like Plaintiff's Exhibit 1. When I first saw Kellogg's biscuit, I did not by any means think it was the same biscuit I had been using. I remember the difference in size. Kellogg's biscuit fits my dishes better. We have had several people at home remark on the niceness of the biscuit and how they liked it, comparing it with shredded wheat biscuit. They asked me when and where I got. it. About three months ago we were entertaining. Someone remarked about the biscuit being very nice and asked me the name of it, when I had been serving Kellogg's biscuit in my house. She mentioned the size of it and liked the taste better. I told her what, it was and showed her the box.

My grocer, Mr. Shannagan, sends down Kellogg's biscuit by his boy. I have never ordered Kellogg's Whole Wheat Biscuit and received any other product. He has never sent me the old biscuit.

CROSS-EXAMINATION.

THE WITNESS: I have been keeping house about twenty-three years. During that time I have known shredded wheat was on 'the market, but I have not used it extensively, because I did not like the shape and it seems not as well done as it ought to be. I have known about it for a long time. I have been through your factory at Niagara Falls and have seen it made on a tour through there, about four or five years ago. It was not a strange item to me at that time. I had known it very well prior to that. I did buy it and use it on a few occasions but not very often, because of the size and taste.

I do not remember how I made the change from shredded wheat to Kellogg's biscuit, how I came to use

Cis

it; but, since a year or so ago, I have been using Kellogg's Whole Wheat Biscuit instead of shredded wheat. I do not buy shredded wheat now, although I saw it made, like many people who took the trip.

EDWIN A. WURSTER.

Deposition taken at Philadelphia, Pennsylvania, March 30, 1933.

DIRECT EXAMINATION.

THE WITHES: I am co-partner in a wholesale grocery firm, Joseph A. Wurster, a registered copartnership in Pennsylvania. We serve mainly restaurants, institutions, and hotels. We handle in our wholesale house Kellogg's Whole Wheat Biscuit, both in packages like Plaintiff's Exhibit 161 and in the individual packages, like Defendant's Exhibit 80. The small package goes to the restaurant. The large package goes mostly to the retail outlets we have, in our own retail stores we control. A few restaurants buy it, also. Roughly, we service several hundred restaurants with the individual size package. About twenty or twenty-five would buy the large package, because they are very small places, buying only a half dozen packages at a time. In the total business, they would represent an almost negligible part of the volume.

The use of cereals in individual packages in the restaurant business is a growing practice. It has been on the increase in the last ten years. It has practically

grown from scratch in that time.

There is a demand from our retailer customers for Kellogg's Whole Wheat Biscuit. We do not use any other shredded product beside Kellogg's biscuit. I used to handle the old shredded wheat. We never had much call for it. When Kellogg's biscuit came out there was quite an increased demand for Kellogg's.

People like i because of the smaller size biscuit. We had so little sale, finally, for the other, that we discontinued it altogether. We handled some of the shredded wheat in individual size cartons, but I do not believe there were ten cases a year of the individuals at that time. We handled it in large cartons like Plaintiff's Exhibit 1.

The demand for Kellogg's biscuit has been created mainly by the service Kellogg gives the restaurants. They have done a lot of missionary work, also given them a combination package, made up of small lots of each of their individual products, which helps the small man, because we never break individual cases. In the old days a man had to take a hundred one kind to the case, which was too much. In certain neighborhoods they do not have enough call for them. Kellogg's men continually call on res taurants. Finding a man of that type, they sell him combination cases that suit his requirements. They protect the wholesaler by giving us profit on the sale. The grocer gets the profit and we get a sale and our profit. We wholesalers surely appreciate that consideration. The restaurant man appreciates it, too. They give him menus and things of that sort. They have developed a very kindly feeling in many restaurants for Kellogg's. That shows itself by an increased demand for the product.

We do not have any kind of demand for Niagara shredded wheat, from the trade. In a year I will probably have a few calls, not exceeding ten. We tell them we do not have shredded wheat, and why. We explain the merits of Kellogg's biscuit. If they see our argument, they buy. The demand for shredded wheat is very sporadic and small.

I know what is going on in the restaurants, more or less. I do not believe the National Biscuit men de any work comparable with the work of Kellogg men. In the very poor restaurants, hash houses, real cheap, they use the large carton and take it right out of the package. They think the large package is an advantage. They do not have enough business for the small one. The better class restaurant will serve it in the package with the top torn off and cream or milk on the side. The practice of serving it in the package is growing. People more or less demand it for sanitary reasons. No hand touches the biscuit.

We have never handled the National Shredded Wheat in the individual carton like Defendant's Exhibit 81 but I understand they are taking the small type of biscuit lately. It was not their original sized biscuit, like Plaintiff's Exhibit 21. They have only packed the other one lately, which, in my opinion, was in order to meet the size of biscuit Kellogg seems to have put ever on the trade. The trade knows Kellogg is making a smaller biscuit than the National, and they favor it. Personally, I believe National tried to put that over to confuse the consumer. They got that out to meet the demand for the smaller biscuit. I do not call on the trade personally, but I have reports from the men that the trade is taking the smaller biscuit. I do not know how much pressure is put on the trade by the National salesman to get them to take it.

I have never seen in restaurants any of the old Niagara shredded wheat displayed in big glass globes filled with biscuits. I think it is kind of a vanished institution.

My organization has a retail store of its own, still conducted under the same name. We handled Kellogg's Whole Wheat Biscuit in our retail store, in the large packages, like Plaintiff's Exhibit 161. We find a consumer demand for it in our store, for the reason people-like the two small biscuits, because they fit better in the plate and do not run over the edge. For the

same reason we stated for the restaurant, we discontinued Niagara Falls biscuit in the store. We are now a hundred per cent. Kellogg. In the beginning, there were a few customers of the retail store who insisted on having Niagara shredded wheat. When we explained the merits of Kellogg's biscuit and induced them to try it, we won them over, and they are satisfied.

We do not substitute in that store. If a customer asks for shredded wheat and the retailer hands them the Kellogg package like Plaintiff's Exhibit 161, unwrapped, it might be an attempt at substitution on the part of the retailer, but it would be a very foolish attempt, because a person would have to be blind. If I go in a store and ask for shredded wheat, meaning the Niagara package, if they handed me the Kellogg package, I could see it was not the same in shape, appearance or color. It might be an attempt. not know what our retailers do. I know we do not have it. We tell them we have Kellogg's Whole Wheat Biscuit. If they like it, they take it. We have been there over forty years and do not have any trouble putting it over and inducing them to try it. When they do, they are satisfied with it. Substitution, in the sense of trying to put across a fraudulent deception on the: public is a rather vanishing institution in the grocery trade.

CROSS-EXAMINATION.

THE WITNESS: When our few shredded wheat customers ask for it, we say we do not have it and show them Kellogg's biscuit. We have been very successful in inducing them to take it and to become Kellogg users. In a not necessarily derogatory sense of the word, that is still not a substitution, because, as I understand the meaning the law would put on the word, substitution would be handing out a package in place of another asked for, without explanation, the customer thinking she was getting what she asked for.

It is a fact that, in our trade, we have been successful in inducing many customers formerly shredded wheat users to become users of Kellogg's biscuit. That is true of many other things in the line. When a customer has become a user of Kellogg's Whole Wheat, that is a substitute for shredded wheat in that customer's pantry, in that sense of the word, not meaning we are guilty of fraud in telling the customer about this type of product we are handling.

Naturally, there is no confusion in my mind between the old shredded wheat package, like Plaintiff's Exhibit 1, and the Kellogg package. That is perfectly plain. I have known Shredded Wheat a long time. I have been in the grocery business all my life. I am forty-three. I have been familiar with shredded wheat. It has always been that large, pillow-shaped biscuit and has always remained the same. There has not been very much change in the package, to my recollection. Shredded wheat has always been a well-known product.

XQ. 80. Up to the time that Kellogg came out with this biscuit, there was nothing else like it, was there?

A. No, not for many years, although there have been other biscuits; for instance, Muffetts, and some other thing came out, a shredded biscuit.

XQ. 81. You have never sold Muffetts in place of shredded wheat, have you?

A. No, but there was an attempt to put that across in the trade that were accustomed to eating shredded wheat.

XQ. 82. Yes, there was: but it did not succeed, did it?

A. No, for various reasons.

XQ. 83. For various reasons. When I say "take the place of shredded wheat," I am trying to avoid the use of the word substitute. Of course, you have a special idea in your mind about that. Why did you say so promptly that you think that the Biscuit Company

put out this small biscuit to confuse the trade? If the Biscuit Company had a right to make shredded wheat, and they found a demand for smaller biscuit, did they have a right to make it?

A. Well, the demand was created particularly by Kellogg. In other word they went out to get that trade. One way to get it was by imitating the style of the biscuit, the shape of the biscuit, and the style and

the size of Kellogg's.

XQ. 84. It never occurred to you, did it, that the Kellogg Company went out to get the shredded wheat biscuit trade, and that the only way that they could get it was to imitate the style and shape of our biscuit? Did that ever occur to you?

A. Well, they were altogether different. The size was different. As a matter of fact, the appearance of the two biscuit—any one familiar with both of them

could pick them out.

XQ. 85. Oh, if you had them side by side, you could pick them out?

A. Yes.

XQ: 86. But you have just told me that you have known shredded wheat all your life. I say, then, that I am just wondering if it did not occur to you that, when Kellogg's came out with the shredded wheat biscuit that looked like them, with its pillow-shape and shreds, as you call them, that they were trying to get the old shredded wheat business in that same fashion.

A. Yes. Yes, certainly they have. That is true.

THE WITNESS: They have, also, gotten something new. They have converted people to the use of shredded wheat, also. They have gotten new customers. How many of the old customers they got I do not know, because I do not know whether they were doing much business before Kellogg's biscuit came out.

I am not attempting to discourage those individual packages. I was unfortunate in using the word con-

fusion. I should probably have said imitation in size. I agree with Mr. Vilas that these packages are different, Defendant's Exhibit 80 and Defendant's Exhibit 81. So, in my view, now, the National Biscuit Company is imitating the Kellogg Company and not the Kellogg Company imitating the National Biscuit Company. They do not imitate the Biscuit Company at all. size of the package, coloring, and everything are different. They called it Shredded Wheat, but they have changed that now. I have handled it when they called it shredded wheat. I have no feeling against the National Biscuit Company. I never bought shredded wheat biscuit from them. We discontinued taking it at the time they took it over and began distributing it direct. We do not have the old shredded wheat in our stores now. Naturally, we do not let customers get away if we can help it and naturally, most of them buy Kellogg's Whole Wheat instead of shredded wheat, which is a matter of personality of the salesman, salesmanship, not substitution.

As I told Mr. Clarke, the Kellogg Company has done a lot of missionary work on this biscuit. In the combination cases for the restaurant trade, they include some Kellogg's biscuit, with their other products. We carry all their products now. The National has not done that sort of work. The National man on shredded wheat called on us a month or two ago, the first time we were ever solicited. The National Biscuit men who go to the stores sell it and also go to the restaurant people and sell them. Naturally, we would not buy a tase of biscuit from them and expect to go out and sell it to the restaurants for the same price that they sell to the restaurants direct. Five or six weeks ago, they wanted us to handle it. They did not have any luck with us. I said I would have to think it over very serion ly. We thought it over but did not fully make up our minds.

We also service institutions, not State, but schools and colleges. We do not enter at all into any of the competitive bidding on public institution. It is safe to say that substantially all our customers, particularly retail, have been won over to Kellogg's biscuit by us.

RE-DIRECT EXAMINATION.

The Wirkess: Shredded whole wheat biscuit, naturally, would have to be a biscuit, we will say, in the shape of a pillow, made of wheat which is in the form of shreds; in other words, which has been shredded.

RE-CHOSS-EXAMINATION.

THE WITNESS: It would have to be in the form of not exactly a pillow, but a biscuit shape. It might be round, but it would have to be something high, could not be flat. You could not take the shreds and have them loose in the form of something like corn flakes. It would have to be put together in a cohesive form of some kind, not necessarily pillow-shaped.

RE-DIRECT EXAMINATION.

THE WITNESS: Shredded whole wheat biscuit might be anything that was made of whole wheat and shredded and held together in some particular form that held it together. It might not be that particular style. To me it would be always shredded whole wheat biscuit, no matter who made it. I cannot think of anything else to call it that would describe it as well as that. That is a description of the product, and that is the thing to call it. It has always been called whole wheat biscuit. The fact that it has been descriptive would not alter, I think. It is always shredded whole wheat biscuit. I think that is all it was. If you should ask me what Uneeda Biscuit was, I would probably say it was a soda cracker. That is so. The trade name

would be Uneeda Biscuit, and the descriptive name would be soda-cracker. If someone were to ask me what the trade name and what the descriptive name of shredded wheat was, I would say it would be just shredded whole wheat biscuit. The only descriptive name I know for it is shredded wheat or shredded whole wheat biscuit. It cannot be anything else.

If anybody asked me what a Kodak was, I would say it was the trade name of the Eastman Kodak Company meaning a camera, the latter word being the descriptive name that anybody could call it by. I do not, however, know any other descriptive name that can be used to tell about shredded wheat, except shredded wheat, or shredded whole wheat biscuit, any other name you could call it.

RE-CROSS-EXAMINATION.

THE WITNESS: Kellogg calls it Kellogg's Whole Wheat Biscuit.

RE-DIRECT EXAMINATION.

THE WITNESS: To my mind shredded goes largely into the description. You ask for a description, and it is shredded, although they do not mention it on the package as shredded whole wheat biscuit. You could have any biscuit made of whole wheat not shredded, and put up in another way. Biscuit might be like crackers or like bakers make in the form of a roll, or almost anything.

If I would imagine I had never seen the Kellogg package, Plaintiff's Exhibit 161 before, hiding the plate so that all I would see would be the words Whole Wheat Biscuit, if somebody asked me what Kellogg's Whole Wheat Biscuit is, I would not have an idea of the shape or whether it was shredded or just made of pure flour or in the form of a roll or what. I would think it was

made out of Whole Wheat. As a biscuit, it might be a little cracker like Uneeda Biscuit or anything of that sort. To that extent, without a picture on it, that would be a blind package, meaning I would have to open it to see what it would look like.

RE-CROSS-EXAMINATION.

THE WITNESS: If you covered up the name and showed me the picture on there, I would know what it was.

RE-DIRECT EXAMINATION.

THE WITNESS: I would say it was Kellogg's; a shredded wheat biscuit, whether whole wheat, now, I could not say.

RE-CROSS-EXAMINATION.

The Witness: It might not be wheat; it might be rye. I never heard of shredded rye or shredded barley. I have heard of a corn shredder. I am not that technical that I should know what it does to corn. Perhaps the word shredded would tell me that it tears it into strips. What it is I do not know. Shredded Wheat is in the shape of strips. Whether they tear it down that way or what I do not know the process. I do not know that the wheat berry is pressed out into a long thread. Shredded, to me, means not what is done to it but the appearance. In this way it is shredded. It might have been made that way or might have been torn the other way. It is shredded wheat, from the appearance.

I have not seen Rippled Wheat yet. I think I will have to say I did not see a biscuit shaped like shredded wheat biscuit until I saw shredded wheat. I never saw anything called a biscuit that looked like that. As far as I can remember, until shredded wheat was known, there was no article of food like it or known by that

name; so it was really a very natural thing to call any biscuit that looks like that a shredded wheat biscuit. I could not think of anything else to call it. That is the first thing that comes to my mind. That is quite natural.

RE-DIRECT EXAMINATION.

THE WITNESS: I knew this Niagara shredded wheat product when it was put out by the Shredded Wheat Company at Niagara Falls. I do not know what the old Shredded Wheat Company did do to push the sale of it; but I know from our experience that we have no calls, no demand. There was never a missionary order turned over to us. I took it for granted they never did. It was a cereal product in our wholesale house. I did not notice any particular increase in the falling off of the demand for the product when the National Biscuit Company took over shredded wheat, but it had declined to a very, very great extent from formerly.

RE-CROSS-EXAMINATION.

THE WITNESS: I am speaking from my own experience. I do not know what happened to the other fellows in another town. They may have done missionary work; but it is logical to expect that, if so, we would be bound to get orders.

RE-DIRECT EXAMINATION.

THE WITNESS: We did not get them, so I assumed that they had not. That condition was true for many years; certainly before the Kellogg Company came into the market with its Whole Wheat Biscuit, and for some time before that. I regard the Kellogg Company as having stirred up a demand not in existence before it came into the fic.

WILLIAM W. BICKHAM.

Deposition taken at Philadelphia, Pennsylvania, March 30, 1933.

DIRECT EXAMINATION.

THE WITSESS: I am a buyer for Alfred Lowry & Brother, wholesale grocers, having thirty to thirty-five salesmen. It is an old-line wholesale service grocery, servicing a territory within a radius of, say, thirty to forty miles surrounding Philadelphia, touching the Jersey coast and downtown, including all of Philadelphia. We have approximately five thousand accounts.

We handle Kellogg's Whole Wheat Biscuit, also Niagara shredded wheat. We have not experienced any confusion in our trade between those two products or any mixing up of orders on them. We have never had any instances of either product being returned with the statement they wanted the other. We have a substantial volume of business on both products. The demand from our retailers for Kellogg's biscuit has been created by their regular workers, through advertising, house-to-house sampling, and regular work, the same kind they have done on the rest of their cereal line. Our salesmen accept orders on both products. I would hardly say we solicit orders on shredded wheat, since the margin of profit is not very attractive. I would say definitely that the Kellogg Company gets the larger degree of co-operation in the sale of its products. We feel there is more co-operation from Kellogg. The National are selling from their own trucks over the territory, servicing the retail grocers. Naturally, we are not interested. It is one of our competitors in the sale of that product. Our principal competitor is the company itself. We do not encounter any competition of that kind, whatever, from the Kellogg Company in the sale of its Whole Wheat Biscuit.

In offering goods for sale through our salesmen, they quote from a price list, carrying the cost to us, as well as the suggested selling price. From memory, I would say the cost of shredded wheat to us is about three dollars and thirty-five cents per case of thirty-six packages. The same plan holds true of the Kellogg product. If due, to the competition of the National Biscuit Company, the best profit we can realize on shredded wheat would be ten or fifteen cents a case, possibly less, their financial interest would be in selling that product to give them a better margin of profit. For those reasons, we not only co-operate more with the Kellogg Company but we regard the Kellogg Company very definitely as co-operating more with us, than the National Biscuit Company does.

Defendant's Exhibit 92 is our Lowry's Blue Book Price List of the Chester Branch, and Defendant's Exhibit 93 is the list of the Camden Branch. On pages three and four, in the price list of grocery products, it is listed under cereals, under breakfast foods, as follows: Cream Wheat, Crackles, Grape-Nuts, Grape-Nuts Flakes, Pettijohn, Puffed Rice, Puffed Wheat, Kellogg Rice Krispies, Kellogg Wheat Flakes, Shredded Wheat, Kellogg Wheat Biscuit, Ralston Wheat Food, Rice Pops, Wheat Pops, Wheatena, Wheaties.

In the price list, Defendant's Exhibit 93, we list shredded wheat, thirty-six to the case, three dollars and thirty cents, and Kellogg's, twenty-four packages to the case, Kellogg's Whole Wheat Biscuit, two dollars and ten cents. That represents the competition we have to meet specifically by exchanges, such as Frankford and Quaker City. Their usual practice is to offer goods on a basis showing a margin of profit about five per cent., in most lines. The price we pay for shredded wheat, weeding out competition, shows

us no net profit whatever. We are taking into consideration the case discount and probably show a cent or two less than its cost to as. My trade conclusion would be that these competitive stores are buying it at a better profit, and that the National is giving a better price to our competitors than it gives to us. In addition, they are selling to the trade we expect to sell to at the same price at which we expect to sell to that trade.

Our men do nothing actively, except soliciting of orders, to help the sale of Kellogg Whole Wheat Biscuit. About all we can do is ask the grocer how his stock is and if he needs any this week, keeping it before him in that way. There is nothing further we can do. I haudle the rest of the Kellogg line. There is a good demand for those products in our store. It is the recognized policy of the Kellogg Company to stand behind the sale of its products and take back any that do not sell.

Shredded whole wheat biscuit would convey to my mind that it was a biscuit made from shredded whole wheat wheat that had been shredded. I would say the Kellogg Company makes that kind of biscuit. Asked to describe Kellogg's biscuit as a physical product, I know of no other language that would describe it accurately. If you asked me what a Uneeda biscuit was, I could describe that, perfectly truthfully, as a soda cracker. One name is the trade-mark name and the other is the original descriptive name. We handle soda crackers that are not Uneeda crackers.

Assuming the Kellogg Company was using Whole Wheat as a short name for its product and somebody asked me what it was, I would know of no other way to describe it than in the language we have been using, that it is a biscuit made from shredded whole wheat, and it is shredded.

The discount difficulty I have spoken of in connection with Niagara shredded wheat has only existed since the National Biscuit Company took over the ownership and distribution. I purchased shredded wheat biscuit for years from the Shredded Wheat Company and there never was any competitive difficulty of that kind, regarding the demand price differential. That has existed definitely since the National took it over, which it is my impression was about two years ago. Up to then, shredded wheat was just an ordinary wholesale article, the same as any other good wholesale article. I never expected to encounter the National Biscuit Company's competition in respect to my customers, in the sale of shredded wheat. That has all occurred since the National took over the shredded wheat business.

In the period I have handled it, fifteen years or so, corn flakes have always outseld shredded wheat considerably in volume, 50 or 60 per cent.

CROSS-EXAMINATION.

THE WITNESS: I cannot recall definitely what I paid the Shredded Wheat Company for shredded wheat. During that period, there were at least one or more price changes, covering the war period. It advanced with other goods. My impression is it was three dollars and sixty cents a case. I am now buying it at four dollars and ten cents, less seventeen and a half, less one per cent. for cash ten days, producing about three dollars and thirty cents.

The National Biscuit Company, in our territory, services its shredded wheat along with its crackers direct to the retailers at present, which makes some competition for us, and we naturally lose interest in that line. The Kellogg Biscuit Company came along about that time and developed an additional volume of business, on which we can secure a profit, due to that development work. I believe it to be correct that

now uses Kellogg's Whole Wheat Biscuit.

We carry shredded wheat in our catalog in the same classification we carry Kellogg's Wheat Biscuit. on page four of Defendant's Exhibit 92, under breakfast foods, we carry Shredded Wheat at 3.35, and, immediately beneath it, Kellogg Wheat Biscuit, 2.10. By the item Shredded Wheat in our catalog we refer to a product long manufactured by the National Biscuit Company and the Shredded Wheat Company at Ningara Falls. That item has been carried by our house for many years, just under that name, shredded wheat. It never was called anything else, that I know of.

I have been associated with the business proper about twenty-five years; but, as buyer, about fifteen. During that period of time, my house has stocked shredded wheat. We always buy it and sell it as just shredded wheat. I think, some period of time ago, Ross put out another biscuit. That was in the early days. I do not remember whether we stocked it. It was a good many years ago. With that possible exception, shredded wheat was the only biscuit of that kind on the market for many years, until Kellogg came out with a similar biscuit made from shredded wheat, although the shape and taste are a little different. It differs in some details, but it is essentially like the old shredded wheat biscuit in its composition.

XQ. 90. Is it not quite natural, when you are asked to describe this Kellogg's biscuit, that you call it shredded wheat, for the reason that you have known this older biscuit so many years by that name?

A. Well, if—in the sense of describing the biscuit, we would say that it was made from shredded wheat; that is true. But, if a customer asked for shredded wheat, you might ask him whether he wanted Kellogg's Whole Wheat Biscuit or shredded wheat.

XQ. 91. Yes. So that, although you carry the National Biscuit Company's product just as shredded wheat in your catalog—

A. That is correct.

XQ. 92.—you would be inclined to question a customer when he asked for shredded wheat, inclined to think that he might not know just what he wanted?

A. No, I do not think so. I do not believe—of course, I do not have direct contact with the retail grocer, but I think that, when an order came in for shredded wheat, that particular package was what we would send.

XQ. 93. You would not have any doubt about it, would you?

A. No.

XQ. 94. You really would not question an order that was written up for shredded wheat, would you?

A. No.

XQ. 95. You would not call back a customer and say, "Do you know what you want? Did you mean to order shredded wheat or Kellogg's Whole Wheat Biscuit?" There would not be any doubt about that, would there?

A. No.

XQ. 96. Therefore, as a matter of fact, the unadorned shredded wheat means the National Biscuit product, does it not?

A. In that sense, yes.

XQ. 97. It has meant that for fifteen years, to your knowledge?

A. Yes.

RE-DIRECT EXAMINATION.

THE WITNESS: I do not think I have ever seen any packages like Defendant's Exhibit 91. It has been so long since Ross had that out, I could not identify it technically as his package. I would say the picture on

1806

that carton represented a biscuit made from shredded wheat. I would say it looks as long a biscuit as the regular Niagara Falls Biscuit, as it is pictured there.

MRS. EDGAR F. CHEW.

Deposition taken at Philadelphia, Pennsylvania, March 30, 1933.

DIRECT EXAMINATION.

The Witness: I am a housewife, with five in my immediate household. We are users of Kellogg's Whole Wheat Biscuit and have been for about a year. I first bought it through my grocer, Mr. Hall, on Linden and Haddon Avenues, Collingswood, New Jersey. He said it was a cent cheaper than the other and he thought it was better. That is the reason I purchased it. I have used that ever since. I liked it from that time on, because it was crisper and browned on both sides. The other did not taste quite so good to me after I had used Kellogg's. It found favor with the rest of the household. They all liked it.

I had bought before shredded wheat like Plaintiff's Exhibit 1. We had used that for years. I at no time thought I was getting the old biscuit when I bought Kellogg's. They were in entirely different packages. One, I knew, was made by Kellogg, and the Niagara shredded wheat, I knew, was an altogether different product. I never mixed the two products up in my own mind, never thought they were the same product. I came here today because a Mr. Rhodes came to my door and asked me. I never knew him before. I suppose he got my name from Mr. Hall.

CROSS-EXAMINATION.

THE WITNESS: I was shopping for shredded wheat when Mr. Hall showed me this Whole Wheat Biscuit. I had been using shredded wheat always for years. It is a very old product, which I had been using for years. Until I saw Kellogg's Whole Wheat Biscuit, I did not know anything I could use instead. I always used shredded wheat until Mr. Hall called my attention to Kellogg's biscuit. I was there one day for shredded wheat, and he showed me this other product. He said it was shredded wheat, and: "Why don't you try it? I have tried it and liked it." I did try it and liked it, too. Since then I have used Kellogg's biscuit and have never used any more shredded wheat.

RE-DIRECT EXAMINATION.

THE WITNESS: When Mr. Hall stated to me it was shredded wheat biscuit, after I opened it up I did not think he had misrepresented it. I have known that package for years. He said he tried it, too and it was a cent cheaper and I might as well save my cent if I could. So I tried it and liked it. It was browner and on both sides, whereas this is only browned on one side. I liked the size better.

RE-CROSS-EXAMINATION.

THE WITNESS: I was paying eleven for shredded wheat. I pay ten for Kellogg's biscuit.

RE-DIRECT EXAMINATION.

THE WITNESS: I ask for it as Kellogg's Whole Wheat. I asked for it once when he was out of it and he just had the other, so I took that, because he told me he was out of Kellogg's.

MRS. LILLIAN M. CLARKE.

Deposition taken at Philadelphia, Pennsylvania, March 30, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, with my husband and child in the household. We are consumers of Kellogg's Whole Wheat Biscuit, and we have used that biscuit about nine months. My grocer asked me one day if I had tried it. I said no, but was willing to. He also stated it was cheaper than shredded wheat. I tried it. He said the Kellogg people were making it.

I had previously had shredded wheat, made at Niagara Falls. I did not think this was the same biscuit of made by the same people. I understood it was made by the Kellogg people. I never mixed up the packages in any way. I have used other Kellogg products besides Whole Wheat. I continued to use the Kellogg biscuit. I liked the size of it better, more biscuit to the package, and also cheaper than shredded wheat. My family like it. I came here today because someone came to my door and made inquiries. He asked me if I had ever used Kellogg's Whole Wheat Biscuit. I did not know who he was before.

CROSS-EXAMINATION.

"THE WITNESS: I had been using shredded wheat regularly in my household for some years before this, quite a long time. I had known about it all my life. It is a very well-known product and was always known as shredded wheat. When I went to the grocery store on this occasion, I wanted shredded wheat, and they asked me if I had ever tried any of the other product. I said I had never tried Kellogg's. He asked me if I had tried Kellogg's Whole Wheat Biscuit which was similar to shredded wheat, when I asked for shredded

wheat, so I was willing to try it. On taking it home and serving it, my family liked it better than shredded wheat. I have used it ever since and have not bought any shredded wheat since that time. We have it in the morning, as a cereal, with milk, taking it out of the box and putting it in a dish. It is served on the table in a dish.

RE-DIRECT EXAMINATION.

THE WITNESS: This was not the first time my grocer asked me to try a new product. Every time I call, if there is something new on the market, he always asks if I have tried it. I am always willing to try something new. If I did not like Kellogg's biscuit, I would not have continued buying it. I find it a more convenient size and crisper than the shredded wheat.

MRS. F. M. SHOLLENBERGER.

Deposition taken at Philadelphia, Pennsylvania, March 30, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife with four in the household, my husband and two children. We are consumers of Kellogg's Whole Wheat Biscuit, using at least two boxes a week. I have used that product close to a year. I first became acquainted with it through my boy. He was at his chum's place and saw it. We were at the store a few days later, and he said, "Oh, Mother, there is that Whole Wheat my boy friend was talking about." We bought a box and liked it right away. I like the taste a little better than shredded wheat. We had used shredded wheat before we knew about Whole Wheat. My boy is very particular about cereals, would not eat anything but shredded wheat or oatmeal or something like that. I used to get shredded wheat for

the summer. He likes the Kellogg's Whole Wheat better. He does not want the shredded wheat now. His appetite keeps up. In fact, my boy seems healthier since he has been eating it. He had a run-down condition. I told the doctor what he had been eating, and

he said, "That is good." He seems to be doing fine. The rest of the children eat it once or twice a week. My husband and the girl will eat it once or twice, but they like variety. My husband does not like shredded

wheat. They only like Whole Wheat.

I came to testify today because a man came to my door and asked me if I was a user of Kellogg's Whole Wheat. I had not known him before. That was my first connection with the case, in any way. He had secured my name through my grocer, Robert Smith, just above Media on Fifty-ninth Street. I am 1400 and he is 1500.

I have had a grocer ask me to try a new brand; but, when he did not have it, I would go elsewhere. If I want a certain thing, I will not accept anything else. If he tells me there is a new product in the market he would like me to try, we try them, and we use them if we like them. Other cereals have come out new, and we tried them but have not taken to them. I have no resentment against the grocer for asking me to try a new product, especially if a new thing comes out. If we do not like it, we do not buy it.

We recognized the difference between the two products when we first bought Kellogg's Whole Wheat. We did not think the packages were alike. They did not taste alike. I did not think I was buying the old shredded wheat when I got this product. When I opened it up and saw it, I thought it looked like shredded wheat biscuits but when we tasted it, we saw the difference. I noticed a difference in the outside of the packages, different name, different shape, and smaller biscuits.

CROSS-EXAMINATION.

THE WITNESS: We had been using biscuit like Plaintiff's Exhibit 1 for a long time. I was through the Shredded Wheat Biscuit factory on my wedding trip. It was a very well-known product and well known to me. Since my boy discovered this Whole Wheat Biscuit and got me to try it, we have used that instead of the shredded wheat. We prefer it. They do not care for the other. If a grocer does not happen to have Whole Wheat and I am in a hurry and take it home, the shredded wheat does not go so quick. It lies around the house.

When I opened up the first package of Kellogg's Whole Wheat Biscuit, I thought for an instant it looked like shredded wheat, and I concluded that Kellogg was making a shredded wheat biscuit. I used this instead of shredded wheat and liked it. I got shredded wheat off and on, but I saw there was no use buying it when we had the other which we liked. It is safe to say that Kellogg's biscuit has supplanted shredded wheat on our table. I serve it by pouring hot milk over it in the winter and put it in the oven the same as I do with shredded wheat, to keep them hot, then put them on the table. In the summer I just serve them the way they are.

RE-DIRECT EXAMINATION.

THE WITNESS: I do not know whether I ever asked for Kellogg's biscuit and got shredded wheat. There have been other things the grocer wanted me to take, but I do not remember about the biscuits. Each time I got shredded wheat or Kellogg's biscuit, I knew what I was getting. It have tried shredded wheat since I got Kellogg's and found they did not like it. I had it in the house, but it did not go as quickly as Kellogg's.

WILLIAM W. SHAW.

Deposition taken at Philadelphia, Pennsylvania, March 30, 1933.

DIBECT EXAMINATION.

THE WITNESS: There are three in my family. I am in the habit of buying groceries and meats for them, because I am home and have had some experience in buying. I have been around more. It is inconvenient for my wife to get around, and I have a car. We use Kellogg's Whole Wheat Biscuit and have had it about two years. It first came to my attention on a shelf in the grocery. My habit in buying is a little different than the average customer. They ask for something. I look up at a shelf and say: "Give me two of those, one of those and one of these." That particular time I happened to see the Whole Wheat. It attracted my attention to the fact that there are two whole wheat biscuits on the market, shredded wheat, for instance. I tried it. Mrs. Shaw said she liked it, that one was enough. Sometimes two of those was not as much as two of the other and they liked the smaller size biscuit and the taste. My analysis of the taste was it was not cooked quite so hard and did require chewing. The reaction was we wanted Kellogg's biscuit again. We have bought it almost continuously when we wanted that type of cereal. I have bought Shredded Wheat as well as Kellogg's. I asked Mr. Hall for Kellogg's biscuit a few weeks ago and he was out of them. I just pointed down the line and said I would take that for a change. That has not converted the family back to Shredded Wheat. We still use three or four packages of Kellogg's a week and are continuing to use it. We have eaten Shredded Wheat when the grocer was out of Kellogg's.

I came to testify today because I understand somebody talked to the dealer and he gave them my

name. I did not know anybody connected with Kellogg or that anybody was going to call until this morning. He asked me if I would come and testify.

CROSS-EXAMINATION.

THE WITNESS: Hall is with me today. He runs the grocery. He is here in Philadelphia with me. Four of us came up on this trip from Collingswood. I have heard there were more, but I do not know who. I do not know the people there. I have used shredded wheat ever since it came on the market, when they demonstrated it by a little Quaker maid who had this wheat and put that toge her in a store. That was more than thirty years ago, I think. Since that time the product has been more or less continuously on the market. I have used it for quite a long time, but I do not think as much as we have of Kellogg's. My family is more grown now, ranging from six to fifteen, the five of them. I have bought shredded wheat for a number of years, ever since it was first put out and the public was taught to know it. We have had it nearly thirty years. Not a week went by that we did not have it in the house, until Kellogg's Whole Wheat Biscuit came on the market. When we got that, we liked it a little better. So far as products are concerned, we are no respecters of persons, if we get what we like. Kellogg's Whole Wheat simply supplanted shredded wheat in our affections, if you want to put it that way.

When I saw them demonstrate shredded wheat with little machines in the store, that is the first time I saw that new product. It was a new product, a new form of food to me thirty years ago. I was working downtown and could see it. If it was on the market before, I would not know, because I was new to business. It was new to me, and it was something I had

to learn to like. We tried it that day of the demonstration. They gave out samples; but whether I ordered any that day, or two or three or five years after, I could not say. Shortly after that or from that time. I knew about this product and would have Shredded Wheat in the house, especially after the children came along. I also knew that as shredded wheat. You do not get a chance to do anything else. It is spread all

over the package.

I first saw Kellogg's biscuit nearly two years ago. It seems to me it was in a higher package than Plaintiff's Exhibit 161. I do not know whether they called that shredded whole wheat then. I knew shredded wheat is made of Whole Wheat. I would say it was about that type of package, even larger. I have seen a package like the Kellogg's Shredded Whole Wheat Biscuit, but I do not remember its being so wide, but higher. I am buying it now in packages like Plaintiff's Exhibit 161. The one I got yesterday had a window in it. When I saw it on the shelf, I did not know what kind of biscuit it was, whether Kellogg's or somebody's else. Whose it was meant nothing to me. It was something new, and I would try it. I continued to get it after that. The family liked it and we bought it. It is usually served in the bowl with milk and sugar, sometimes with a little bran on it. When we have served shredded wheat we often use a little hot water to soften it up, first.

FREDERICK HALL.

Deposition taken at Philadelphia, Pennsylvania, March 30, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer, at 1030 Haddon Avenue, Collingswood, a Quaker Store. We deliver to our customers and take a great many telephone orders, as the regular Quaker Stores are doing. We extend limited credit where it is justified. We have only lost six dollars and fifty-two cents since we have been in business.

We carry Kellogg's Whole Wheat Biscuit, such as Plaintiff's Exhibit 161, and have some on our shelf right row. I have some of the Niagara shredded wheat on my shelf now, too. At the present time I am selling more Kellogg's biscuit. The consumer demand for it is growing in our store. I like it from a business viewpoint. That is the reason it has been going in my store. I push it. I make the most satisfactory profit on the Kellogg biscuit. The trade conditions making that possible are that we buy one for a dollar thirty-six a dozen. We sell it for the same price and make 6 per cent. gross, which does not pay for the trouble. The Kellogg biscuit we buy at a dollar forty for twenty-four packages, and it pays me about 13 per cent. gross.

For a while I would not handle shredded wheat, because I felt we were not being given a square deal at the price they were selling it for in our district, chain stores at ten cents. We had requests and I had to put it on the shelf. I did that, but I sold it at eleven cents, because I am not going to pay for advertising anybody's product. That was a cent above the prevailing market. One of the Kellogg salesmen came around and told me about Whole Wheat Biscuit. We compared prices and I told him to put in a case and we would see how it went. We stuck it in the window. There was so much demand created for it that, if I am out of it now, people will not take shredded wheat. We have exceptions. A woman the other day when I was all out of shredded wheat for the moment, asked for it. I said, "How about Kellogg's Whole Wheat Biscuit?" She particularly likes the old-fashioned kind and would not take Kellogg's. She has to pay a cent more for it. We have very few customers like that, old-fashioned people. They do not like to try anything new. We very seldom substitute in our store, except with the customer's consent. We make it a rule not to. If I knew a customer and her likes and dislikes well enough, we might do it if I were out of what she called for, but with anyone new coming in, we do not substitute, because we think it is not good business:

If anyone asks for shredded wheat, we give them shredded wheat. At the same time I will call their attention to Whole Wheat Biscuit. That is perfectly legitimate, from our viewpoint, because it is all right for me to say that. I say, "Here is a biscuit similar to shredded wheat. Why not try it? You may like it, and it will save you a little money." That is the way I have been introducing it. Customers do not seem to resent that a bit. Most of them, if you can suggest a saving of a cent, will take it; so we built up quite a business in Kellogg's biscuit and I am selling about three to one Kellogg's over shredded wheat.

I do not believe we have any confusion in our store between the two products. I do not recall any customer sending back one and saying she ordered the other. Our customers know the two products and ask for them. If I am out of one, they may take the other. A woman the other day, when I was out of Kellogg's, said she would wait until I got it in. They seem to favor it. When they try it, they stick to it, a majority

of my customers.

Shredded wheat means to me shredded wheat put up in the form of a biscuit. It is whole wheat, shredded, in the shape of a biscuit. I have seen the Niagara biscuit made but not the Kellogg. We have regular bi-weekly calls from the National Biscuit salesman, every other week. When I first brought Kellogg's biscuit in there, the salesman tried to get me not to handle it, spoke to me and told me there was a lawsuit

on it at the time, and possibly-I might get into trouble from handling it would him we would take a chance on that. It was on the open market for sale and I saw no particular reason why I should not handle it. never bothered me about it from that time on. handle National Biscuit goods in limited quantities. They co-operate with us in trying to make a profit on the sale of some of their goods, but not on shredded wheat. I figure money spent on Niagara shredded wheat is spent advertising it. Our competitors sell it at ten cents, and it would lie on the shelf if I did not. I decided I would not sell it at that. The Kellogg man came and helped me out. I can sell Kellogg's biscuit for ten cents and I keep shredded wheat for those who want it, at eleven cents, a premium of one cent in my store over the chain store price. Certain people will pay that naturally, anywhere. As a grocer I do not like the prospect of having to sell a product for one cent more, because it prejudices people against your place, makes them feel you are not meeting competition.

I get telephone orders for shredded wheat, which I handle the same as if they were in the store. After customers have tried the Kellogg biscuit, they invariably seem to like it and stick to it, although maybe not in every case, but pretty generally.

I would not say the Kellogg Company has cooperated in producing or stimulating consumer demand for their biscuit, except the few cases I brought in, where they gave charts for the children and made it very interesting. In that way they really pushed it for a while. After the product took on, they did not have to use those premiums. They left us alone. I would rather that 99 per cent. of them would. I would rather have a product that sells on its own merits. Premiums are rather a bother to the grocer, in one sense. We give out jig-saw puzzles on a hundred and one things today. You have the stock, and, if you do not have the puzzles, you have to get another lot. It is not a good thing for the grocer.

I find this type of breakfast food, Kellogg's biscuit and shredded wheat, is probably one of the best sellers we have, except Corn Flakes is best, then All-Bran, and then this product, Kellogg's biscuit, and then the other shredded wheat. The name Kellogg's on that package is not a detriment to the sale of it, because they have so many good products, Rice Krispies and Corn Flakes, etc., so the name on there induces them to buy. There is good will for the other products carried over on to Whole Wheat.

I should think the effect of taking over shredded wheat by the National Biscuit Company, so far as creating an additional demand in the market for shredded wheat is concerned, would be the same as Kellogg's here, because, in general, the National Biscuit Company's name is good. It would create good will in the trade for the National to take it over, providing they were a little more liberal in their discounts to grocers. They refused to equalize the discount for the grocer, which antagonized him, because we are all in business to make a living. If National had been more liberal with us, probably Kellogg's biscuit would not have gotten far. When you antagonize a group of grocers, they are naturally going to resent it, because a grocer is human and your action is hitting his pocketbook. That resentment has not been expressed in any way I would regard as illegitimate. If they did not like the manuufacturer, I do not know that they would refuse to handle his goods. A man who would do that would be very foolish. A man looking after his business is another matter, because you cannot put likes and dislikes into a business. It is a question of business sense. I

might like the National or their opponents very much, but, if I could not make as much money as I could by putting on a competitor's product of a similar nature, I would naturally favor the competitor's product, recommend it, as by saying, when they asked for shredded wheat, "Why not try this?" That is regarded as perfectly legitimate, I would-say.

CROSS-EXAMINATION.

THE WITNESS: I have converted possibly twenty to twenty-five customers of shredded wheat to Kellogg's in that manner. Those who have been switched over are sticking to Kellogg's, so they have been converted from users of shredded wheat to users of Kellogg's. I buy my shredded wheat at three dollars and thirty cents and sell it at ten cents, or three-sixty for the case, giving us thirty cents profit on thirty-six sales. No, it is about nine and three-quarters per cent. gross profit. On the Kellogg Company biscuit, at ten cents, I get two-forty and make thirty cents a case, which my slide rule says is twelve and six-tenths per cent. My statement of six per cent. gross is a slight understatement, just roughly out of my mind, without calculation. It is not quite as bad as I thought, but bad enough. A man cannot run a place under ten per cent. on the gross, and that is a trifle low. I am not affiliated with the Frankford Grocers. I am with the Quaker Wholesale Grocery Company as a director. That is a voluntary chain; or co-operative chain I think is the better term. A voluntary chain is another stor but the co-operative chain is composed of owners. The voluntary chain is a wholesale grocery business wagging the other dog. I own my own company and thereby combine my buying power. We have about nine hundred and eighteen stores. It is quite a substantial organization, the second largest in the country. We have a very large buying power. We can make the manufacturers give us the same prices as the chain stores get. We can put our soap on the pavement at least two per cent. cheaper than they, because we have not so many superintendents running around loose.

We do co-operative advertising of shredded wheat. All our goods, everything in turn, get advertised. I have not seen Kellogg's Whole Wheat Biscuit sold for nine cents a package in my place. It may be sold competitively for that, but I do not know of it. I have been in business since last October. I was not in the grocery or food business before that. I was an engineer last year. Before, I was assistant chief process engineer of Victor Talking Machine Company, and research engineer for the Welsbach Company, and president of Bergren Engineering Corporation of Trenton. I have not been long in the grocery business. I have been familiar with shredded wheat a great many years. It has been an old standby, since many years ago when they first made shredded wheat at an exhibition at Manasquan. I saw them make it. I was at Niagara Falls once, but not to the factory. I have used shredded wheat. I have both products in the store. Shredded wheat is an old household article that people know as shredded wheat. I have never used the term or heard it used, Niagara shredded wheat, until Mr. Clarke used it today. In my store, it was not necessary to designate it. They simply ask for shredded wheat. When they ask for the other, we give them Whole Wheat Biscuit.

XQ. 122. They sometimes ask for shredded Whole Wheat Biscuit, do they not?

A. Yes, sir; because you cannot stick a product right in your mind immediately. It takes time for your—

XQ. 123. No. And the Kellogg's shredded wheat serves the same purpose as the Niagara shredded wheat, as my friend calls it?

A. Yes.

XQ. 124. It is a similar product, is it not?

A. Very similar.

XQ. 125. You are able without much difficulty, are you not, to induce a woman to try the Kellogg's instead of the other?

A. Very. It is a very easy matter.

THE WITNESS: I do not call that substitution, because we sell it under another name. We might tell them it is similar. Wheat Flakes is very similar to Wheaties. I do not know the difference when I eat them.

When I came to set up my business, I had to stock shredded wheat, because there was a demand for it. I did not know anything about Kellogg's biscuit then. Since we have had that, it has got to the point where we do not have to stock so much shredded wheat. We do not have to renew it so often. We keep it for the benefit of those customers who stick to it, as a matter of accommodation.

The reason I am so enthusiastically back of the Kellogg biscuit is I make a better profit on it, and that is good business for me. If the National Biscuit Company was as good, I would not be a bit surprised if we might be able to switch some of the customers back, because that is natural.

RE-DIRECT EXAMINATION.

THE WITNESS: I am director in our wholesale organization. Quite a number of the other members of it use Whole Wheat Biscuit. We sell quite a lot from our warehouse. You will find it listed in our catalog every week. Quite a number of members handle that prod-

uct. Some are known as the R. G. E. Stores, Retail Grocers Exchange. I could not say whether they sell more of Kellogg's biscuit than shredded wheat.

WILLIAM E. SKELLENGER.

Deposition taken at Philadelphia, Pennsylvania, March 30, 1933.

DIBECT EXAMINATION.

THE WITNESS: I am manager of the Retail Grocers Exchange, an organization of retail grocers owning their own wholesale house. We service about two hundred, mostly in and around Wilmington, Delaware. I am manager and buyer. My title is secretary and manager. I have to do to some extent with the arrangement of the stores and the way the common business is conducted. I buy and sell for them. If they want advertising, I run that. I am the head of it.

We handle Kellogg's Whole Wheat Biscuit, also some Niagara or the original shredded wheat. I rather think my greater volume is on Kellogg's, because shredded wheat is handled by the National Biscuit Company direct. They took over from the wholesaler the distribution of that product, away from the wholesaler. I was familiar, as a wholesaler, with that product, before the National Biscuit Company took it over. Our organization built up some business in Niagara shredded wheat, which was taken over by the National when they acquired the Shredded Wheat Biscuit. They still sold us; but we, as wholesalers, are now in competition with the manufacturer himself in selling to the retail trade.

I do not know whether we get some discount not possible for our retailers to get. I do not know what discounts the National Biscuit Company gives chain stores. Our general impression is that retailers can buy on just as good terms direct from the manufacturers as they can from wholesalers.

We have no confusion in our wholesale or retail organization between the two products. I know of no instance where products are sent back with the statement it was the other that was wanted. Our retail organization is a co-operative buying organization, also we have a co-operative selling organization. All the grocers in the buying group are not in the selling. The selling group have a uniform sales method with the same products to sell on the weekly advertising plan. All the members are in the buying group, have to be, in order to be a member of the selling organization and advertising group. It is not compulsory. Nearly half the membership is in the advertising and selling departments.

Our organization has co-operated with the Kellogg Company in pushing the sale of Kellogg's Whole Wheat Biscuit. We have advertised it occasionally. The member have given it store and window displays. They have accepted advertising material and assistance, and little display cards and things of that kind from the Kellogg Company and have used them in their stores. Window, store, and counter displays are effective methods of drawing the consumer's attention to new products.

I think Kellogg's biscuit is a little cheaper in general retail selling price than the shredded wheat. They make a better profit on the Kellogg biscuit. That tends to create fayor toward the product among the retail distributors.

I do not think substitution, a person asking for a product definitely by name and the retailer giving her another product which she thinks is the one she asked for, is practiced in our retail stores. I do not think it would be possible, in that sense, to substitute Kellogg's Whole Wheat for the Niagara shredded wheat

without the customer knowing what she was getting, thoroughly. If a man happened to be out of shredded wheat, he might say, I am out of it, but I have Kellogg's, or vice versa; but it would not be ignorantly or

deceptively substituted.

I have asked the National to give me a wholesale price on shredded wheat which would make me a profit as a wholesaler distributing it. I asked the manager at the Wilmington branch to talk it over. That is all it came to. He said their plan was to distribute direct. They used to have a plan of quantity purchase, the more you buy the bigger the discount. I am under the impression that our retailers get seventeen and a half per cent. discount on purchases from National, irrespective of the quantity they buy, as I now understand. I am told all grocers get it, whether they belong to any co-operative organization or not. The name of one wholesale organization is Retail Grocers Exchange. Our advertising members have a uniform sign. The others have their own individual fronts. Those with the uniform fronts have a sign, R. G. E. Store.

I personally would not mix up the two packages, like Plaintiff's Exhibit 168 and Plaintiff's Exhibit 1,

or confuse them, one with the other.

As far as I know, the efforts of the manufacturers to stimulate the sale of Niagara shredded wheat have been as great in the retail trade since National took it over as they were when the old Shredded Wheat Company was pushing the product. I do not know whether it is handled in the same way it was handled by the old Shredded Wheat Company. I presume the sale of the product was transferred from the special shredded wheat or cereal men in the old business to the eracker salesmen of the National; but I do not really know the situation in the trade. We handle the rest of the Kellogg line of cereals. They are well-known products in the grocery trade.

I do not remember ever carrying a whole wheat biscuit made by the Ross Biscuit Company of Batavia, New York, some years ago. We did handle Muffetts, which is a similar product. Our co-operative selling organization has advertised Kellogg's biscuit from time to time. They have given window and store displays to that product.

CROSS-EXAMINATION.

THE WITNESS: Our organization is a purely cooperative wholesale organization, run for the benefit of our members. We are not in the position of the oldhine jobber who cannot make the profit on shredded wheat that he used to when he handled it direct from the manufacturer. The profit we make is for the benefit of our members. We are not considered a profitmaking organization but a mutual organization. The idea is to sell products to our grocers as cheap as we can and give them the benefit of our combined buying power. If the National services them direct at the same cost we could buy them for, it does us some harm. We are not obliged to make a profit as a wholesaler; but our grocers belong to our organization to save money. If every concern did business like the National, our organization would be no good. There would be no occasion for it. If our members obtain shredded wheat at the same price the jobbers could. I would not say they are accomplishing everything the organization was designed to accomplish. If we had no Retail Grocers Exchange and each member had to buy Shredded Wheat and Kellogg biscuit from the jobber and pay a profit to the jobber; we now, having combined in a buying exchange, as the head of it, represent the jobber for them. We buy from the manufacturer at the same price the jobber does and pass that along to our members.

The common enemy of the independent grocer is the chain store. They buy stuff at the wholesale job-

ber's cost. Therefore, they could in years gone by, sell at a price the retailer had to pay and make the joboer's profit. The big object of our organization is to buy. goods as cheap as the chain storer and pass it to the retailer at a profit enough above st to maintain our organization, operate our central cifices. At the present time, however, as far as I know, our stores are purchasing shredded wheat independently and having it delivered right to their doors from the National, at the jobber's price. I am told that any grocer, whether he belongs to our organization or not, gets that price. Some grocers not belonging to our or any other organization that they are getting seventeen and a half discount on all National Biscuit Company products. I was told by them that they did not belong to any organ; ization, and they were joining ours. My impression is there would be little object in joining ours if they belonged to another. We service approximately two hundred stores. About half of them participate in the advertising department. Eighty-five are there.

We do stock shredded wheat and dispose of it on order to some of our grocer members. Some grocers do not buy from the National and therefore procure it from us. Those who do buy it from the National get the greatest discount. The majority of our members do buy from the National. I have been in the grocery business about thirty years, twenty-eight in the wholesale end. During all that time, I have carried shredded wheat. I have been familiar with the package, like Plaintiff's Exhibit 1, and the name and product for all those years. During that time, it was the only product of its kind. I cannot remember when it was first brought out. It was a new kind of product. I know that, during all those years, the Shredded Wheat Company spent a good deal of money and effort in advertising its product to make it popular, and it has become a very well-known product, always known as shredded

wheat. Not until comparatively recently, within a year or two, have I had Kellogg's biscuit which could be sold competitively with shredded wheat, two or three years, probably. Kellogg's biscuit is now an item that competes with shredded wheat. Most of our stores carry both items. My impression is that the retail price is a little higher on shredded wheat. I do not know just how the grocers hold it up. We very seldom include shredded wheat in our advertising. I do not think we ever have the chance to cut it so close that we can advertise and sell it. There is still a good demand for shredded wheat. I would say shredded wheat sells more than Kellogg's Whole Wheat, probably sixty to forty per cent. I get Kellogg's Corn Flakes. That is the largest selling cereal of its kind on our market, sold pretty close by chain stores, too. We have to sell Corn Flakes very close. 'I think it is advertised as low as two for fifteen. The chain stores run it at approximately the same price. That gives us our regular profit. We try to average at least five per cent. gross; but that does not apply to every item we sell.

A cash-and-carry store should average fifteen to eighteen per cent. gross profit to operate efficiently. A credit service store should average twenty to twenty-five. Ten per cent. gross is a pretty low operating margin for a service store, as a regular diet. On specials we sometimes operate for less than that. It could not be done on all items. If he did it all the time, he could not stay out of bankruptcy for long.

RE-DIRECT EXAMINATION.

THE WITNESS: I told Mr. Vilas some retail grocers told me they were getting as good a profit as they could through an organization. I do not know positively that they are. That is the representation they made to me. We are led to believe we are getting as good a price on

shredded wheat as anybody is getting. The representations made to me did not convince me that we are getting as good a price as anybody else, entirely. We have complaints from members that the chain stores are selling at prices that cannot meet. They seemed to have the impression that the chains are getting prices that enable them to sell at those retail prices at a profit or without loss.

RE-CROSS-EXAMINATION.

THE WITNESS: I have been told the chains sell loss leaders at times. My people sometimes mark down popular items close to cost basis, many times. That is not uncommon in the grocery business, either among chains or among independent retailers. I have been told by representations of the National that we are getting the maximum discount. I am inclined to doubt that, because of these reports from our members. That is what I meant to convey in answer to Mr. Clarke's question. I do not know that we are not getting as good a price as anybody else. It would be a greater comfort if I did.

HOWARD S. GLANDING.

Deposition taken at Philadelphia, Pennsylvania, March 30, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a merchant, handling groceries and meats, under the name of Herman Glanding Company, a retail store, a large one in our line. In the whole business I have between thirty-five and forty assistants.

We handle Kellogg's Whole Wheat Biscuit, also the Niagara shredded wheat. We were one of the first ones in Wilmington, Delaware, to put in Kellogg's biscuit. We carried it while it was known as Kellogg's Shredded Whole Wheat Biscuit. I know it was first known as that. I have carried it since it has continued to be known as Kellogg's Whole Wheat Biscuit.

I have no confusion in my mind between those two products. Customers do not send either one back and say it was the other one they ordered and wanted. One product is known as just plain shredded wheat. The other one is mostly asked for as Kellogg's Wheat Biscuit. I would say we have had calls for it as Kellogg's shredded wheat. If a customer asked for it that way. she would get Kellogg's biscuit. There is a consumer demand for Kellogg's Whole Wheat Biscuit in our store, I would say a substantial demand today. volume of sales of Kellogg's biscuit is nearly 50 per cent. of shredded wheat. We have given window, store, and counter displays to Kellogg's Whole Wheat Biscuit and have advertised it in all circular work. We have had special sales on it. During those sales, we have asked customers if they would like to try it. We show them the package, say it is Kellogg's Whole Wheat Biscuit. When those sales are on, you have a little chart or premium of some sort for the two-package combination, or the Wheel of Knowledge. We have also had Saturday sales, where a combination of three other Kellogg products is sold, with one package of Kellogg's biscuit free. Those sales are mostly conducted by Kellogg men. The two products are practically the same in price in our store. We make a better profit on Kellogg's. Our store is a service store, taking telephone orders, making deliveries, and extending credit where justified.

If the customer on the telephone asks for shredded wheat, she gets Niagara shredded wheat. If they ask for Kellogg's shredded wheat or for Kellogg's Wheat Biscuit, they get Kellogg's.

I would not say that our customers resent requests to try new products, to any considerable extent. Some people would not try a new product. Others want to try everything new on the market. They will try anything new when it comes on the market. Substituting is not practiced in my store in any way. For instance, if you come in and ask for shredded wheat biscuit, we would not by any means ask you to take Kellogg's, unless we were out of one and would ask you if you wanted to try the other. The customer gets what she asks for. If I were out of shredded wheat and asked her if she would like to try Kellogg's. I would not say that that was deceptive substitution. We do not substitute anything, unless, in certain cases, to retain the sale with something that is the equal of The clerks, however, are instructed to give the customers what they ask for, regardless of the item or the price.

If a woman said she wanted shredded wheat and I said I had none but I had some Kellogg's Whole Wheat Biscuit and asked her if she wanted to try it, I would figure that was legitimate. When you do it that way, it is not exactly substitution. It gives the woman a chance to try it, if she would like to. We are not forcing it on her, merely submitting it to her if she wants it. We do not regard that as illegitimate.

CROSS-EXAMINATION.

THE WITNESS: I have been in business since 1904, all that time in the retail grocery and meat business in Wilmington, meats about six years before we put groceries in. We carried shredded wheat a long way back and knew it then. It has always been in probably the same style package as Plaintiff's Exhibit 1, and has always been the same biscuit. It was a very well-known product among the public. For a long

time, to my knowledge, until Kellogg came out with this biscuit, it was the only thing of its kind. People always ask for it as shredded wheat. When they ask for it today, I know they mean this product made at Niagara Falls. Only recently they have become conscious of this Kellogg article and sometimes ask for Kellogg's Shredded Wheat, although that is not the name of the product. They even ask for Heinz Rice Krispies, but we give them Heinz Rice Flakes, because Rice Krispies is a well-known name to apply to such an article. A woman becomes confused. She knows what she wants. I think, when she calls it Kellogg's shredded wheat, she wants the Kellogg's Wheat Biscuit. You will not find many who will memorize the whole name; but they know what they want. It is quite natural to call this Kellogg's shredded wheat, because she has known this other article so long.

I do not know what would be the reason for Kellogg's Whole Wheat Biscuit edging up on shredded wheat within three or four years to nearly 50 per cent., any more than this Kellogg name, as much as anything else. Kellogg products have always been outstanding. They came out with Whole Wheat Biscuit, and it was displayed, and special sales have been offered to try it with their other products. The National Biscuit Company has not given me any special sales that P recollect or any such co-operation as the Kellogg Company has, or any such advertising helps. I would not . say that the picture of the dish on the package or the cellophane window feature is attractive and makes people buy it. I think, if anything, it is the Kellogg name, rather than anything else on the package is concerned. I would not say I have especially favored this Kellogg's biscuit in my store or pushed it any more than shredded wheat. I would not favor one against another when there is a profit on it. We want all the

profit we can make. We make a little more on Kellogg's than on Shredded Wheat.

I know right away, when a customer asks for shredded wheat, what she wants, and she gets it. If a customer came in and bought shredded wheat, it is not our practice to ask if she has tried Kellogg's, unless we have a special demonstration or sale on it. If we have a sale on, with a combination and one biscuit package free, if a customer asked for a package of shredded wheat, we would not ask her to try Kellogg's biscuit. If she asks for her order, including a package of shredded wheat, we do not substitute anything, not even our own brands, until she is through. Then we start to offer the special combination of Kellogg's or whatever it might be. I do not know if there have been instances where a customer has been switched to Kellogg's instead of shredded wheat. We carry other items of the National Biscuit line, and our store is serviced by the National Biscuit Company salesman. We carry shredded wheat along with the other items and get them direct. We are a member of the Retail Grocers Exchange, but we do not buy our shredded wheat from them. We get it direct.

RE-DIRECT EXAMINATION.

THE WITNESS: We have had no shredded wheat from the Retail Grocers Exchange. I cannot tell you what they want for it within the last two years. Before that, we got shredded wheat through the Exchange. Since National took it over, it has always come by the cake salesman. I get Kellogg's biscuit through the Exchange.

THOMAS J. MORRISON.

Deposition taken at Philadelphia, Pennsylvania, March 30, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a dining car operator and owner, at Frankford Avenue and Conklin. We have five help, with my partner and myself, altogether. I have been in that business about six years. We have Kellogg's Whole Wheat Biscuit in the small cartons like Defendant's Exhibit 80. We open it up in the presence of the customer and put cream or milk on it. I cut it open on the counter in front of my customer and dump the biscuit into the plate or bowl. Customers call for bran, or whole wheat biscuits, or corn flakes, or something like that, never mentioning the name.

I do not think we handle any whole wheat biscuit except this Kellogg's biscuit. I do not remember having handled the Niagara Falls biscuit like Plaintiff's Exhibit 21. I was out of the car for two years. They might have, two years ago. I have never had any experience in connection with it. None of our customers ever expresses dissatisfaction with Kellogg's biscuit, says it is not what he wanted, or turns it back. They seem to like it. We have regular customers on it. We run specials, with fruit salad, toast, coffee, fifteen cents. I think that cuts down the sale of all cereals and that sort of thing, any brand. I do not remember having customers call for shredded wheat. I was out for two years. I never heard of it. We have all our goods displayed on top. One company has puffed rice. I have seen them there, but I do not know whose name. if any, is on them. They pay for it right there.

CROSS-EXAMINATION.

THE WITNESS: I do not know which of the cereals in my car sells most lately, since we put on specials.

We have regular customers, though. We have bought them in case lots, small cartons, whether different varieties or not I could not say. My partner does most of the buying. We buy a case like that every three or four months. It is not a fast mover. We have not had anybody come in and ask for a dish of shredded wheat. Cereals in our car do not mean much. They come in and ask for bran or corn flakes.

If somebody said, "Give me a bowl of shredded wheat," I would be stumped to fill that order. They look up on top to see the things we have, usually. We have a little rack over where the ice box is. It has it in display. They will say bran, and things of that kind. The only time I ever heard the name of a product mentioned would be when we have a fellow come in and ask for Kellogg's Bran.

RE-DIRECT EXAMINATION.

The Witness: Ours is a forty-foot dining car, larger for a dining car. When a fellow does seem to buy corn flakes, he buys them all the time. You have your regular customers and practically know what they are going to ask for every morning. That was before we had our specials. That is funny. I often remark I think we ought to put them on our specials. It would be better. I think handling cereals in the little individual cartons is great. You cannot make any mistake. In the lunch bar business, we try to do everything right. It is just a case of getting it and cutting it open. By another method, you might give them an ounce too much or a speck too little. The package is the best way. It is sanitary, and I think the customer likes it.

RE-CROSS-EXAMINATION.

THE WITNESS: We have menu cards. I do not think we list our cereals at all, unless we have corn



flakes. We have menus furnished by Kellogg. We have a menu book and paper. On the bottom of the paper is a picture of Kellogg's.

CLARENCE A. MORRISON.

Deposition taken at Philadelphia, Pennsylvania, March 30, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am in the business of meats and groceries, and have had my own store since I have been in that business, about twenty-five years. It is conducted under the name of C. A. Morrison, at 2936 Westfield Avenue. We handle Kellogg's Whole Wheat Biscuit, for which there is a consumer demand in our store. People mostly ask me now for Whole Wheat Biscuit. When they do, I give them Kellogg's Whole Wheat Biscuit. I do not now handle shredded wheat. like Plaintiff's Exhibit 1. the Niagara Falls product. I stopped kandling it three or four years ago, because the chain stores sold it for about what I paid for it. I could not sell it at a profit to meet their competition. I do not handle other National products any more, because I could not make a profit on them and keep up with the A. & P. stores. I have to make a profit to stay in my business. I had both products right along until three or four years ago. I never had any confusion between the two, never any instances in which customers sent back the product and said it was the other one they wanted. Kellogg's is called for as Whole Wheat. I have not had a call for Shredded Wheat for a year or more. If a customer came in and said she wanted a package of shredded wheat, I would say I do not have it. I would not just let her walk out; I would tell her I had Whole Wheat. I tell her there

are fifteen biscuit in the package, very nice, and ask them to try it. They usually do try them. I have not had any of them bring them back and say they did not like it. I have a big volume of business on Kellogg's Whole Wheat Biscuit the way conditions are today.

I have put in orders for Whole Wheat to the whole-saler and gotten something else, about three or four years ago. I had several cases of Whole Wheat Biscuit, and I told the wholesaler I wanted Whole Wheat, and they sent me shredded wheat. I sent it back to the wholesaler and told them what I wanted. Then I got what I wanted. That was not a very grievous transaction as far as I was concerned. I got a product I had not asked for, sent it back, and got what I asked for. That is in our line, every day, that way. That transaction did not put us out of busienss or drive us wild. Sometimes I ask for Pale Dry Ginger Ale and they send me light and I do not want it. I send it back and get what I want.

We do not practice substitution in my store. used to have a butcher working for me a couple of years ago, who never had a calves' liver for years in his store. He always sold pigs' liver for calves'. I would not do that. The customers who asked for calves' liver and got pigs' liver went out thinking they had got what they asked for. That is one method of substitution. Assuming, when a woman asked for shredded wheat, she meant Plaintiff's Exhibit 1, I do not think you could give her a package like Plaintiff's Exhibit 168 and have her walk out of the store thinking she got the Niagara Falls package. I do not think I would be expert enough to create that impression in her mind: I do not think any grocer could do it. have to tell customers today that I have new products and ask them to take them in place of other products I am out of, to gain customers. That is not regarded

in the trade as illegitimate. I have been through that with Mother's Oats and things of that kind. It is a case of making a profit on it. I think it is a very good product. I make a profit on Kellogg's Whole Wheat Biscuit. I did not figure I made a profit on shredded wheat by selling them the same as the rest of them did, on account of the chain store competition. When I figured I could not make a profit on shredded wheat, I dropped the sale of it. I co-operate with the Kellogg Company in bringing Whole Wheat Biscuit to the attention of consumers, giving them window and store displays from time to time, using the store cards, hangers, and strips they furnish me. I just had one of their combination special sales on their new flakes. this week. The salesman came around two or three weeks ago. I never have a sale of three Kellogg products with a fourth one free. The sale is just putting that on the floor with a sign on that. That sale included among other things the Whole Wheat. We charge twelve cents for Kellogg's right along in our store.

We do not handle any other National Biscuit product, because I have Ivins' Cakes, and they sell. You do not get any discount from a company like the National. If you bought twenty-five dollars worth, they would send you a check for the discount at the end of the month, when I was there. I got tired of that when a fellow with four or five stores sold Saltines down the street for sixteen cents, just what they cost me. I took them out after that and have not dealt with the National Biscuit Company since.

I have tried the Kellogg's Whole Wheat Biscuit and found it very good. I like them a little better than shredded wheat. I have eaten both. I prefer Kellogg's. The same customers repeat on Kellogg's biscuit. They seem to come back for more. I do not be-

long to any co-operative buying or selling organization. I am just an independent grocer, selling by telephone, making deliveries, and extending credit if it is justified. We wait on our customers. They do not serve themselves.

CROSS-EXAMINATION.

THE WITHES: I have been in business about twenty-five years and used to carry shredded wheat. I have been familiar with it a long time. My customers used to be familiar with it and asked for it as shredded wheat. It was a well-known name in the trade. I have eaten shredded wheat. I switched to Kellogg's biscuit about four years ago. I was then and had been for many years carrying shredded wheat. I had some customers who asked for it, but I had to let it go. After a while, I got the Kellogg biscuit, and I was able to retain my customers by switching them to Kellogg's biscuit. I had samples, showed them what they are, told them how good they are, and they bought it. I have not had a shredded wheat customer for a year. I do not have as many old customers as I had. I have been where I am now for about eight years. tomers are regular customers, many of them old customers, none just transients who pass by. Many of them stay with me year in and year out. Many of them used shredded wheat and are now Kellogg's Whole Wheat Biscuit through my efforts. Many of them would come in and ask for shredded wheat, and I would tell them we do not have it any . more, that we have Kellogg's. I would indicate them how to ask for Kellogg's instead of shredded wheat. They ask for Whole Wheat now. I could not say how many customers have been switched over in the four years from shredded wheat to Whole Wheat Biscuit. Nothing new today is moving very fast, not even Kellow's Whole Wheat Biscuit. It is rather slow. I still

have some of my old trade. I know I have three or four steady on it all the time. During the day, I do not know. That does not represent a very large volume of sales. I do not sell a great many cases of Kellogg's in a month. Camden is very poor. I sell as much as a whole case of Whole Wheat Biscuit in a month. In the old days, I think I sold about a case of shredded wheat per month. It is pretty safe to say that my trade that

RE-DIRECT EXAMINATION.

was once shredded wheat is now devoted to Kellogg's

Whole Wheat Biscuit.

THE WITNESS: I did not mean to tell Mr. Vilas that the same customers who now buy Whole Wheat Biscuit are the customers who used to buy shredded wheat Biscuit; much different. Those armies are recruited from new customers. Some drop out and some come into the new army of recruits for any product. Some of them are old ones, not many. I think of one right here who was a customer of the old shredded wheat some years ago, who now uses the Kellogg product and has ever since he got out of shredded wheat, three or four years ago. He tells me he likes the Whole Wheat Biscuit better than the old one, so I do not think I have done him any injury by introducing him to the new Kellogg product.

RE-CROSS-EXAMINATION.

THE WITNESS: I understand the reason I could not obtain a larger discount from National is that I do not buy as much as some other people, so I felt I could not carry the line. I do not like the stuff to sit on the shelf. I like to move it. I do not like to see anything go bad. Years ago, I carried a full line of National Biscuit cakes. It got so I could not sell enough of them at the price I used to get for them, to pay me for having them.

CHARLES W. MILLER.

Deposition taken at Philadelphia, Pennsylvania, March 30, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am general manager of the Keystone Wholesale Grocery Company, a co-operative wholesale organisation for buying and selling. We have three hundred of our members, and two hundred are in the selling organization, which is called Keystone Stores. Those members who participate in the selling do not have uniform store fronts, but we have a uniform sign hung in front, green, with gold letters. They are all in Pennsylvania, principally in Berks County, with a few over the county line, such as in Pottstown. They are service stores. Some of them make deliveries and extend credit, and some do not.

Our organization carries Kellogg's Whole Wheat Biscuit, like Plaintiff's Exl. bit 168. We have carried the product ever since Kellogg put it out, five or six

years ago, I think.

We also carry shredded wheat, like Plaintiff's Exhibit 1. We sell the most of Kellogg's biscuit, about three cases to one last year, in favor of the Kellogg product. A big majority of our members handle the Kellogg biscuit as retailers. We can undoubtedly get a hundred per cent. or between ninety and a hundred on any thing. There is a consumer demand for that product in those retail stores, which has been created in various ways. They first put out measuring bowls, then a kind of game in books, then an educational geographical chart from the Kellogg Company, to give out with the biscuit. They did a lot of newspaper advertising. They send their salesmen around at times to make lots of displays. When they had their first campaign, they had three men working on window and

store displays. Our organization connected it up and ran ads similar to that at various times:

The paper you show me, Defendant's Exhibit 94, is the ad from *Reading Eagle*, February 4, 1932. That same sort of ad has been conducted through the newspapers from time to time. It was also broadcast on the radio, that Wednesday to the following Tuesday.

Store circulars have been distributed direct to customers from different stores. I think Mr. Moyer, one of our members, has some of the circulars he put out. Kellogg's Whole Wheat Biscuit have been advertised through those means. We only advertise the four specials. We may have others. We always say: This week's big four, and then they build theirs around those, which are the main specials we advertise. Defendant's Exhibit 94 starts off with about half the space devoted to Kellogg's biscuit, and the lower half with four specials, of which one is Kellogg's biscuit, that week. We change every week, When an ad is run like that in the Reading Eagle, our stores hook up with it. They make counter and window displays with the posters we give them, exactly like those. They are put in windows. The items they feature in those displays will be the four items we display in the advertisement.

We will not stand for substitution. If a woman comes in and asks for a certain thing and a storekeeper gives her something else and she goes out thinking she has what she asked for, I would consider that substitution. It is deceptive substitution. None of the stores in our advertising group does it. I have had cases in which customers have asked in our stores for just shredded wheat. I do not run the stores. Each one runs his own store. If anyone called up and asked for shredded wheat, unless they specified otherwise, we would give them the National Biscuit Company's shredded wheat. We have store conferences. I sit in

at their meetings. We have had this question of substitution up at those conferences. We have an advertising committee meets every Tuesday. Samples of these two biscuits are on my desk. On man said a woman asked him for a box of shredded wheat. He handed down a package of the Niagara; and she said, "No. I do not want that. I want Kellogg's." I will say that, nine times out of ten, they ask for Kellogg's Whole Wheat Biscuit. Sometimes they ask for shredded wheat and I find, when I have gotten the Niagara shredded wheat, they want the other. They say they wanted the smaller biscuit. By that the clerk under-

stands they mean the Kellogg product.

If a customer asked for Kellogg's Whole Wheat Biscuit, I do not think the grocer could hand her the shredded wheat package and get her out of the store thinking she got what she asked for; nor vice-versa. The packages are too dissimilar in looks. Each package would publish it was not what the customer had asked for. Our wholesale organization now carries both kinds of biscuit. Two years ago last December, the Shredded Wheat people, through the National Biscuit Company, notified us by letter, Defendant's Exhibit 95, dated December 1, 1930, that, effective January 1, 1931, they would turn their goods over to their local a eucy. I wanted to give them an order during December for a carload. They said they would not sell as, that we had no salesmen on the road and were not in a position to do them any good. Shortly after January first, they stated they had changed their method and would let us have it, and they gave us seventeen and a half per cent. I received this letter by mail, headed National Biscuit Company and dated December 1, 1930. They offered the seventeen and a half per cent. discount some time in the first months of the following year. I would not accept it right away. until they would give our members seventeen and a half

per cent. on everything they purchased, which requirement they finally acceded to. For a while they would not sell us. After that, we would not stock it for several months.

Before we got that letter, we bought Niagara Shredded Wheat in carloads. That business had been created through sampling. As wholesalers, I do not think we did anything in particular to create demand for shredded wheat, only we were in a distributing channel for three hundred stores. That was a buying association at that time. We could save them money, coming through us. As a wholesale association, acting through that buying agency, we did have carload orders for Niagara shredded wheat. We had no advance notice that it was going to be cut off, except the letter of December 1, 1930, which was a surprise to us. There are five hundred and fifty cases to a car, and I think we were using a car every sixty or ninety days. That letter was the way I knew exactly where I was. We were so surprised they had a meeting in the Manufacturers' Club in Philadelphia, of the various clubs, and, when I told them about it, Mr. Haase got after them and told them he wanted to buy a car. It was good we needed a car then, because, otherwise, we would never have known they did not want to sell it to us. I rendered an order for a car of shredded wheat, and Mr. Haase and the local manager were up in my office. I said I wanted to buy a car, and they said they could not sell it to us. I regarded that as an offer tendered and rejected, had no doubt about it. That is why their local manager brought Mr. Haase there, to have his authority to turn down our order, and it was turned down. We have never bought a car since. The Kellogg Company has never turned down any of our orders for any of their cereal products. Mr. Haase said they refused to accept that order because we had no salesmen on the road.

I do not believe any of the National people said anything to us about handling the Kellogg biscuit at any time. I have heard of this litigation from time to time. I do not remember how the information came to me. The National salesmen come to see me, soliciting orders on Niagara shredded wheat, and Kellogg's men do the same.

The National cut us out from shredded wheat when they took it over, but not as soon as they took hold of it. They had it for some time. Mr. Haase explained their method of handling through their agency was to increase their sale through the agency on account of the slackness in their business. He said that was a matter of self-preservation; that they wanted to have the agency show a larger percentage on the account, so as to enable more people to make higher discounts.

At the time National took over the Shredded Wheat business or shortly after, they let out the old shredded wheat sales force and began selling that biscuit through the cracker salesmen of their own organization. They closed their Philadelphia office. For a long while, we had to buy carloads through their local manager. They did not carry shredded wheat in stock at that time. They took the shredded wheat out of the hands of their salesman here and closed their Philadelphia office. They only sold the jobber. I think their local manager took care of that, which was quite a change in the old selling methods of shredded wheat.

CROSS-EXAMINATION.

THE WITNESS: Mr. Haase explained to me at that time that the National salesman would serve shredded wheat to the retailers along with the crackers and that, in taking the business away from the jobbers, they intended to go direct to the retail stores and supply them with shredded wheat, just as they were doing with the crackers, and that the retail stores would profit to the extent that the volume of shredded wheat would apply to their sales for discount purposes. So, in the latter part of 1930 or early part of 1931, being unable to get shredded wheat in carload lots, we bought Kellogg's Whole Wheat Biscuit; but we had purchased it before that. We bought it in pool cars prior to that time, but not a whole carload of Whole Wheat Biscuit. We never have. There is no necessity to. Then the National came back and said they would again recognize our organization and would like to have our business. It was too late then for that carload. Since about April or May of last year, we have been purchasing some shredded wheat, and we have been going ever since. We buy twenty-five cases at a time, about twice a month, or a total of about five hundred and twentyfive cases last year, for our membership.

A certain proportion of our members purchase direct from the National Biscuit Company salesman. We try to discourage it. We do not like them to do that. We have to reduce our overhead. We get some shredded wheat now, however, getting it through to our retailers.

I have been in the grocery business all my life. I have been with this company as general manager ten years. The company has been operating about fourteen years, purchasing as a co-operative organization. I do not know how many of our members carry shredded wheat. I should judge about the same proportion as carry Kellogg's. About ninety per cent. of them handle Kellogg's, and I think many of them also carry shredded wheat. I know and have known shredded wheat. I could not make any mistake between those two packages. I questioned our office girls before I came here, so I am sure when I say no substitution has occurred in our warehouse. I do not know about any of our individual stores. There might be some con-

fusion there. I called on our stores to find out if substitution was practiced in any of them. We are always interested in having stores of good clean reputation. I do not believe some of them have occasionally sent a Kellogg package when shredded wheat was ordered.

I know H. B. Schaeffer, Bernville, Pennsylvania, and Sander of Lenhartsville, and Fehr of Shillington, and L. E. Rote, of Reading, and Max Bachl, and C. H. Hoffman, members of our stores. I do not know that Kellogg's Whole Wheat Biscuit has been delivered as shredded wheat by each one of those within a comparatively recent time. We would not let them in our organization if we knew they did it. We do not approve of it. I could not say it was not done.

I recognize one of our ads in the Reading Eagle dated May 5, 1932, Plaintiff's Exhibit 210. That is one of our ads and appeared in that paper. That is what I said about the Wheel of Knowledge. That ad was paid for by us. I see on the same sheet the Shredded Wheat advertisement adjoining our box. Most of the national advertisers like to get near us. They know that is where the home-town stores advertise.

Plaintiff's Exhibit 211, page from the Reading Eagle, February 4, 1932, is the same as the other one. The reading matter for the top part, about Whole Wheat Biscuit, I judge was some material the Kellogg people send out in their advertising. When we advertise pineapple, for instance, I generally hunt up some of the advertising the pineapple people do, out of magazines or somewhere. I would not want to state that that is just as the Kellogg people furnish it. We make it up ourselves.

I recognize Plaintiff's Exhibit 212, page of the Reading Eagle, Thursday, May 12, 1932, as our ad on one page of it. I will not say I recognize the ad of the Kellogg Company on the page you showed me. I do

not remember seeing that one, that I know of. We will even take up their advertising and run our ads on it.

We do not advertise shredded wheat in our advertisements. We never advertise anything we have direct competition in, where they sell our stores. We do not advertise that line. We never aid anything that competes with us. We think there is too much to sell that does not compete. Except in one or two instances, I do not know at what retail price the two products are selling in our stores. We do not attempt to dictate prices, except to regulate the four special items for the week and have them all carry those at that price for that one week. Otherwise, they are at liberty to fix their own retail prices.

We deal with Standard Brands only on what they do not sell direct to the stores. Royal Baking Powder, I guess, is the only thing we purchase from them. They have wanted us to advertise it, but we have not done so yet. Standard Brands puts out a gelatine dessert, on which they did the same thing National did on Shredded Wheat, servicing the stores direct and cutting us out. They would like to get back now, but they have not come to it yet.

RE-DIRECT EXAMINATION.

THE WITNESS: The last two paragraphs of Defendant's Exhibit 95 meant to me that, as Mr. Haase explained, they would only have jobbers who had salesmen and would sell it on those list prices. They asked us in that letter not to deviate from those prices. They said they would take off our hands anything we had. We had it all sold, so that was not necessary.

We generally copy the material for advertising Kellogg's Whole Wheat Biscuit from some ads we see. They did a lot of advertising in the *Reading Eagle*. When we were writing up an ad, I looked up all those

things and copied them. I did not mean to imply that the Kellogg Company are furnishing us copy. They did not know what we were going to say in our advertisement until it appeared.

GEORGE W. MOYER.

Deposition taken at Philadelphia, Pennsylvania, March 30, 1933.

DIRECT EXAMINATION.

The Witness: I am a grocer. My store is Moyer's Daily Market, at 1523 Cotton Street, Reading, Pennsylvania, a combination meat, green goods and grocery store. We wait on the customers in the grocery department. There is no self-service. About 90 per cent. is cash and 10 per cent. charge. We receive telephone orders and make deliveries.

We handle Kellogg's Whole Wheat Biscuit and have had it, I believe, nearly ever since it has been on the market, about four years. There is a consumer demand for the product in my territory.

I now again handle shredded wheat from Niagara Falls. There was a time when I did not carry it. We sell about eight packages of Kellogg's biscuit to one of Niagara shredded wheat. They purchase it as Kellogg's Whole Wheat Biscuit. The other product is sold as shredded wheat. If a customer asks for shredded wheat, we give her shredded wheat. She does not always mean that Niagara product when she says it. In a very large number of instances, people ask for shredded wheat, and, when we get it, they say they do not want it but want the other package, the smaller biscuit. That happens in numerous cases. I have never had them return a product purchased and say it was not what they wanted, since they marketed it. As far as I know, I have never had a customer get

one of those packages, though she wanted the other, thinking she got what she wanted. I forbid substitution in my store. It is positively forbidden to our clerks. If the customer is there and we do not have an article, you can tell her you do not have it or that you have some other item which will take its place. On telephone orders, we can call them or tell them we are out, or something of that kind.

In view of our experience of a customer saying in many cases the Niagara biscuit is not what she wants but the Kellogg package, when we get a telephone order for shredded wheat biscuit, we ask them which one they want, shredded wheat or Kellogg's Whole Wheat Biscuit, because, for a year or longer, I have not handled shredded wheat biscuit at all. They refused to sell them to the Keystone Wholesale Grocery, to which we belong, and we cut them out. We had to pay more for them than we did through our own organization. Then we discontinued handling them. During that time we explained to our customers why we were not handling them. Our customers knew why it was at that time. If they would not take Kellogg's biscuit, they would walk out without the other one they desired. When a customer asked for Niagara. shredded wheat, we told them we did not handle that, but we had the Whole Wheat Biscuit, which gave them fifteen biscuit to the package and a half ounce more. They could return it if they did not like it, and we would refund the money. In nearly every case, they tried it. We very seldom lost a sale on it. There is nothing illegitimate in our use of that method, nothing improper in telling our customers those facts.

Our Keystone organization advertises in the newspaper about the food elements, the different formulae on the packages, and we use that. In nearly every case the consumer tried it. In a very large number of cases they repeat. They seem to like the product. Defendant's Exhibits 96 and 97 are circulars we put out every week.

Besides those circulars carrying advertisements of Kellogg's Whole Wheat Biscuit, we have a window display, sometimes a solid window. I have two large windows, a hundred and ten inches wide and three feet deep. We often make a solid display in one window and some of our specials in the other. We give store displays, also. The Kellogg people put out different games and inducements to buy their package, also sampled on it a few days before in the neighborhood. At present there is a substantial consumer demand for the Kellogg product in my territory. general average price for Kellogg's Whole Wheat Biscuit is, I think, ten cents. The general average price for the Niagara Falls biscuit is eleven cents, I believe. That is what I get for them. If we run a special on Kellogg's, it is nine. I cannot compete with the chain on shredded wheat, and they often sell it at nine. So I put no sales effort behind it at all. I have had full window displays of the Kellogg product.

We have had Saturday sales in our store on Kellogg's Whole Wheat Biscuit. The different times we put a special effort on, we put premiums out and a cash prize for the man selling the most among the clerks, and used different sales efforts. That was when I did not handle shredded wheat. The Kellogg company furnished a salesman who was in the store at the time of those sales, the same as a demonstration.

CROSS-EXAMINATION.

THE WITNESS: I was without shredded wheat a year or more. I put it back when they started to sell again to the Keystone Wholesale Grocery Company. I am practically a 95 per cent. customer of the Key-

stone Company and a stockholder. We had some demand for shredded wheat, which continued when we put it back. When we were without it, I explained to the customers who wanted shredded wheat why we did not sell it, and asked them to try Kellogg's Wheat Biscuit. Some of them did and some not. I would allow those who did not to go out, the same as today we do not handle Royal Gelatine. That loses some sales. Some people try some other brand. We did the same with our telephone customers. If they ordered shredded wheat, we would explain we did not handle it, and why, and induce them to take Kellogg's biscuit and try it. I would say about 70 per cent. of my customers were switched from Shredded Wheat to Kellogg's biscuit by those methods. That may be taken to account for Kellogg's biscuit outselling shredded wheat eight to one in our store.

Many people, even now, come in and ask for the small shredded wheat, when they mean Kellogg's. I know what they mean when they say small shredded wheat. Sometimes they just mention shredded wheat, and, when we get it off the shelf, they say, "No; we want the other package with the small biscuit in it." They sometimes call it the small shredded wheat and sometimes Kellogg's shredded wheat. There can be no mistake between the two. They are right alongside each other on the top shelf. The customer can positively see it as we take it down.

RE-DIRECT EXAMINATION.

THE WITNESS: People, as far as I know them, eat shredded wheat until they get tired of it, and then switch to another cereal, and then get tired of that and practically come back.

RDQ. 77. When you told Mr. Vilas that seventy out of a hundred of your customers that used to buy

Niagara shredded wheat biscuit now buy the Kellogg's shredded wheat, did you mean that, out of a 100 per cent. demand, there had been a 70 per cent. shift, or did you mean to say that the same 70 per cent. of customers who used to buy the others were now buying Kellogg's? What did you mean?

A. I think that what I meant by that was that 70 per cent. of the people that formerly used shredded wheat are now using Kellogg's Whole Wheat Biscuit.

RDQ. 78. That is to say that, out of a hundred customers who bought the old product, seventy of those are now buying the Kellogg product?

A. Yes, that is approximate.

RDQ. 79. And they are apparently satisfied with it?

A. Positively, or they would not come back and repeat.

MRS. WILLIAM D. (ELSIE) BOYER.

Deposition taken at Philadelphia, Pennsylvania, March 30, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, with three in the household, my husband, myself and my son. I also have full charge of a laundry. I did have a girl with me but not any more.

We are all consumers of Kellogg's Whole Wheat Biscuit and have used it about two years, a pretty long time. I had been using shredded wheat, but not regular, just every now and then. I have been using Whole Wheat Biscuit or whole wheat products, anything with whole wheat in. I noticed Kellogg's W ole Wheat Biscuits and thought I would try them I bought them, liked them, and have continued to use them ever since. I like the taste of them better than

the old shredded wheat I had been using. I like the size. They fit nicer in the cereal dish. These are not so fine. There is just something I like better, taste and all. I have continued to order them ever since. I never ordered another package of the original shredded wheat.

Since I got the two products, I have never mixed them up in any way. Once I went in a store. I do not remember if I asked for Whole Wheat Biscuit or shredded wheat. They sent me a box. I said I did not want that, but I wanted the Kellogg's. They were confused that one time with it. They did not have them at the same place. Six feet or so away they had them separated from the other. When they handed me shredded wheat, I knew right away it was not what I wanted. Since that time I have been asking for Kellogg's. I do not think now I could get the packages mixed up any more. They could not give me either one and make me think I was getting the other. I made a purchase of shredded wheat when they did not have the Whole Wheat and I did not want to wait.

I came to testify today because Mr. Hopkins came to where I work. They told him at my grocer's, Bausher's, that I am a regular user of Whole Wheat Bisquit and sent him to me. He asked my people to let me off to be down here today. That was the first time I met him.

CBOSS-EXAMINATION.

THE WITNESS: I did not know who Mr. Hopkins was before that. My grocer is W. S. Bausher & Sons, in Reading. I was in the store the first time I saw the Kellogg biscuit. I think I asked about it, if that was the same. Or I think I noticed the picture of the cereal in the dish on the package. That was what I thought was whole wheat biscuit. I did not know shredded wheat was made of whole wheat. I never read what

was on the package. I did not read the package very carefully. I did not know it was whole wheat. I recognize the package as the one I was buying. I never noticed the words whole wheat on the bottom of the package before. I did not notice on the back: "Made of the whole wheat-nothing added, nothing taken away." I do not use it now. I did not use it so much. I had been using Kellogg's Bran and all things of that sort. I would use it once in a while. I had known it for many years. It is an old product. I knew it as shredded wheat. When I saw Kellogg's Whole Wheat Biscuit, I knew it was something like shredded wheat. I noticed the biscuit on the package. Since then I have not bought any shredded wheat. It is about two vears since I used it. Ever since I have been housekeeping, about twelve years. I had been using shredded wheat, but not as regularly as the Kellogg's Whole Wheat

MRS. EVA KISSINGER.

Deposition taken at Philadelphia, Pennsylvania, March 30, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife. There are eight of us in the family, and we are consumers of Kellogg's Whole Wheat Biscuit. I use all their products, a lot of their Corn Flakes and Bran. We like the Kellogg products and use a lot of them.

A son of mine had a lot of trouble with his bowels. My boy always suggested he try whole wheat. He had been using shredded wheat before that. We had the Whole Wheat Biscuit, and I thought that tasted better than the other, because it was toasted on both sides. I told him I thought he should try it. He did and liked it. We have been using it ever since. If they want a quick

dish of it, I heat milk, put it over, and have it ready when they sit down. They say what keeps me so fat is that, when I get hungry, I take half of it with the knife, put cheese on it and put it on top of the gas, letting it stay there a minute or two. It is very tasty and I eat lots of it. I use Corn Flakes all the time. Not all like the Whole Wheat Biscuit. I use the bran, too. I make muffins out of it and use a whole lot of it.

I happened to come to testify today, because the gentleman outside, Mr. Hopkins, came to me and asked me. I did not know what he wanted to know it for before he came to the door. I had never met him before. He got my name from my grocer, Mr. Bausher.

Cross-Examination.

THE WITNESS: I have used shredded wheat for a great many years. I think I have kept house about twenty-seven years, and I have used shredded wheat all that time in my household, with other cereals. I am familiar with it and have been during all that time. There are many ways of using it. My people do not care for pie crust, so I roll the whole wheat up fine with butter and put it around the pie pan. That is Kellogg's Whole Wheat, because it is not so tough. When you mix it with butter and pad it around the pan and put a filling in it, just put it around nearly medium with the gas and brown them. It was my son who first mentioned it. I have been buying it from Mr. Bausher. After I first tried it, I did not buy any more shredded wheat, at any time. The Kellogg product take the places of shredded wheat in my home. We like it a whole lot better.

RE-DIRECT EXAMINATION.

THE WITNESS: Mr. Bausher's son comes to my door each week and gets my order. I usually buy enough in that line to last me a week and I give him my order and tell him what I want, which he ends me.

RE-CROSS-EXAMINATION.

THE WITNESS: He knows what I like. If I get anything I do not like, I send it back to him. I do not tell him I want shredded wheat any more. I always tell him I want Whole Wheat Biscuit.

RE-DIRECT EXAMINATION.

THE WITNESS: I have never had any mix-ups between the two packages.

ROBERT J. SMITH.

Deposition taken at Philadelphia, Pennsylvania, March 30, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer. I have been connected with the retail grocery business about twenty-eight years and have never done anything else. I handle Kellogg's Whole Wheat Biscuit, like Plaintiff's Exhibit 168. I also handle Niagara shredded wheat. The volume of sales on shredded wheat is greater. I think it is the best seller of the two, about sixty or sixty-five per cent. to forty or thirty-five per cent. of the Kellogg biscuit. The demand for Whole Wheat Biscuit is an increasing, growing demand. There is a consumer demand in our store. Customers come in and ask for Kellogg's Whole Wheat Biscuit.

I had an experience with one of my customers, a lady named Shollenberger, a short time ago. She stated she did not want anything but Whole Wheat Biscuit, that her boy liked them. She refused to take the Niagara shredded wheat. I told her I was sorry I was out of it but I had shredded wheat biscuit. She insisted upon Kellogg's. When they were in, she came back and got the Whole Wheat Biscuit later, so I did not lose a customer on that account.

I do not practice substitution in my store. It is not a good practice. My definition of it is something just as good, or something very much like it, and saying that we have an article just as good or just the same. We do not do that. It is not a good policy. I do not call that deceptive substitution. It is not good for the merchant. When a customer asks directly for an article, you have that article in stock and want to sell the one they ask for. If a party comes in and says she wants some wheat for breakfast, it is all right to suggest something then.

In our store, if a customer wants shredded wheat, we just give her the Niagara Falls product; and, if she wants Whole Wheat, we give it to her. In this one instance I was out of Whole Wheat Biscuit and asked Mrs. Shollenberger if she would like to try the other. She would not use it. I did not regard that as one item substituted for the other. I just simply mentioned it. It was a biscuit. That is all I know.

When we have a new product in the store, we sometimes introduce it to the attention of our customers with window displays. I claim the counter is better. I think you get closer to the people and talk to them on it. 'I cannot say I have ever done anything in my store to push the sale of Kellogg's Whole Wheat Biscuit or treated it any differently than I have the Niagara biscuit. They are both on the shelf, and I hand them out in response to the demand for each. I do no advertising, absolutely not. Mine is a service store, extending credit where it is justified, making deliveries, and taking telephone orders. I have not had any mixing up between the two products or any confusion of them in my store. I think we had one package sent back. I never substitute it. It is bad policy. I would rather tell a person I am out and will have it in a short time.

In this one instance where the package was sent back, it was straightened out, and that was the end of it. I do not remember ever having any other transaction, because I never made a practice of substituting. It is not good. It seems to me that I sent this woman shredded wheat. I would not like to say. I am pretty sure she sent it back and said she wanted Kellogg's.

I have heard of customers refer to Kellogg's as the little shredded wheat or as the small shredded wheat biscuit. I never really heard anybody ask for small shredded wheat biscuit. They ask me for shredded biscuits and shredded wheat. I have never had the other question put to me. I do not think I have ever had customers ask me for Kellogg's shredded wheat. I do not recall that.

CROSS-EXAMINATION.

THE WITNESS: We have handled shredded wheat for many years. I may have been out of it for a short time a couple of years ago. It has been a well-known product, well advertised, and well known to the public. My customers always ask for it as shredded wheat and have for years. I have no doubt what they mean when they ask for that product. I have noticed a difference in the biscuit. They are different biscuit entirely. At the time of the Mrs. Shollenberger incident, as to qualo ity. I had not noticed any particular difference between the two kinds. It had not really occurred to me at that time. I have had Kellogg's since they first came out, a few years ago. Up to then, all the shredded wheat biscuits I sold were shredded wheat, although it seems to me that there was another on the market years ago. With some possible slight exceptions, nothing else filled the order for shredded wheat, which was what we particularly handled. Shredded wheat sells about sixty to forty of Kellogg's at the present time.

I guess some of the people who now buy Kellogg's Whole Wheat Biscuit are people who used to buy

shredded wheat. Possibly, some are new trade. I have been about twelve years at the one place. I have a large number of steady customers. Some of them shifted to Whole Wheat. I have had some change to Kellogg's Corn Flakes, I suppose through advertising or goods displayed on the counter. They wanted to try them because it was something new.

I give a person what she asks for, because it has always been my custom never to lie. I have done very little of pushing forward with advertising or display. When a new product comes in the store, I always give it a chance, laying it on the counter or sometimes in the window. I did that for Kellogg's Whole Wheat Biscuit. It was on the counter and in the window. At present, they are both on my self, on display. Our customers ask me for what they want and I have no trouble about that. We give them what they ask for.

RE-DIRECT EXAMINATION.

THE WITNESS: It is an entirely different package, in appearance and all. I do not think I could sell a customer one of them with the idea she really had shredded wheat when she had a package of Whole Wheat Biscuit. I would not even try it. It would be misleading. I would not want to do it.

ISADORE COHEN.

Deposition taken at Philadelphia, Pennsylvania, March 30, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a grocer under the name of Lebanon Delicatessen. I have been in the grocery business about sixteen or seventeen years. I handle Kellogg's Whole Wheat Biscuit like Plaintiff's Exhibit

168. I handle Niagara Shredded Wheat, like Plaintiff's Exhibit 1, and I have some of the new package, with the purple grass, which I got last week. That reached me already.

I find a consumer demand for both these products. That is why I got Kellogg's, because I had people asking for it. They sell in a proportion of about three packages of Kellogg's biscuit to seven packages of shredded wheat. I have no confusion in my store between the two products, never have a customer send back one and say she ordered the other.

If a customer calls for shredded wheat, we give her shredded wheat. If she calls for Kellogg's Whole Wheat Biscuit, we give her Kellogg's Whole Wheat Biscuit. If a customer said she wanted Kellogg's shredded wheat, I would say that Kellogg's is not shredded wheat but is Whole Wheat Biscuit. I would straighten it out in that way. I have customers who ask for Kellogg's Whole Wheat, which is why I started to handle it. I handle a lot of it now. A salesman took a case, came back, and took it again. Then there was a demand, and I got it back again and have been selling it right along, too.

Occasionally have customers say they want Kellogg's shredded wheat. A few say: "What do you, nean by Kellogg's Whole Wheat Biscuit?" They are smaller biscuit, and I think there are fifteen in the box. There cannot be any confusion between the two products. We take orders by telephone and handle them in

the same way Phave just described.

I do nothing to create a demand for either of these products.' I treat them both the same way. When I got them first, I displayed them and had a box in front, of the Kellogg biscuit. They did not go so well then. After that, I treated them both alike, on the shelf, the same as the other one. I keep all my cereals in one place, and I have the same price for both of them, ten

cents, the tag right in between the two packages, so it relates to both of them. I do not advertise. Ours is a delicatesses store. We have groceries and fresh meats. In the summer time, we order pretty nearly a case a week of shredded wheat, and one every two weeks in the winter. We have a pretty good sale for the delicatessen store. We make deliveries and extend credit where it is justified. I have four people to help me in the store. I do not know how the demand for Kellogg's biscuit has been created. I know customers started to call for it, and I started to handle it.

CROSS-EXAMINATION.

THE WITNESS: There is only one shredded wheat. That has been so for years. That is shredded wheat, Plaintiff's Exhibit 1: and this is the new shredded wheat. That has been so as long as I am in the grocery business, selling it. I do not know how many years. It has always been known and asked for a shredded wheat, and as nearly as I can remember, it has always been in the same package. The coloring of the package has just been changed, but it is the same size, and the biscuit has always been of the same general size and appearance. People have asked for it and known it as long as I have been in business. Some people claim they buy it because it is a smaller biscuit and more in the box. I myself am using Kellogg's shredded wheat. because one of the old shredded wheat is too much for breakfast, and two of Kellogy's is just enough. I like it for the same reason some of my customers do. It is a little more toasted, I think. That is my opinion. I never asked a customer why they should like it better or what their reason is to favor it.

I really could not say if many of them are people who have used shredded wheat and have switched to Kellogg's. I guess we have one or two that were buying shredded wheat and have been going in for Kellogg's. I do not know how that came about.

JOHN HOPKINS.

Deposition taken at New York, N. Y., April 4, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am district sales manager of the Kellogg Sales Company and have been connected with the Kellogg Company since December 1, 1910. Before that I was in the cereal business with the Shredded Wheat Company, my duties being sales and advertising of shredded wheat. I was with them from about 1904 to 1910.

The Kellogg Company was not putting out a Whole What Biscuit when I started with it. They put out a shredded wheat type of biscuit about 1928 or, 1929. They had a dough biscuit before that. I cannot remember if it was flavored or not, but it was made from dough and squeezed out, flattened biscuit. I think it was called Kellogg Biscuit.

My present territory is from the northern boundary of Hunterdon County, New Jersey, across over to the northern boundary of Ocean County, New Jersey, and from there cn down to Cape May. Then I go south through what we call the eastern shore, taking in Delaware, eastern Maryland, and two counties in Virginia. down to Cape Charles, and west as far as Hancock, Maryland. In Pennsylvania, I go as far on one railroad line as Lewisburg and Williamsburg, and in Tioga County to the New York State line. I go east from there with the exception of the county in the extreme northeastern corner of Pennsylvania, which comes under the New York office. I take in the District of Columbia, too. I have about twenty-seven or twentyeight salesmen in my district, engaged exclusively for the Kellogg Company, selling Kellogg Company prodncts, Kellogg's Corn Flakes, Kellogg's Pep, Kellogg's Whole Wheat Biscuit, Kellogg's Rice Krispies, Kellogg's Krumbles, Kellogg's All-Bran, Kellogg's Wheat Flakes, Whole Wheat Flakes, and Kaffee Hag Coffee. Our Wheat Flakes come in competition with a product known as Wheaties. They are competitive to us. They are also in flake form and are a product of General Mills.

The work we have done in our territory to introduce to consumer attention and create consumer demand for Kellogg's Whole Wheat Biscuit has taken various forms. We have sampled. We have gone into food shows. We have done what we call Saturday promotion sales. We have used different merchandising pieces handled through the grocers, the first one being a green glass measuring-cup, graduated. We also used a book of games, and then the Kellogg Wheel of Knowledge, or geography chart. Last year we had the Jungle Land Books. I have a couple of those pieces here. Defendant's Exhibit 98 is the Story Book of Games which has been given out with Kellogg's Whole Wheat Biscuit.

Defendant's Exhibit 99, is the geography chart or Wheel of Knowledge. That is a feature that has been in demand among consumers, in order to create a demand for Kelloggs Whole Wheat Biscuit.

We have used newspaper advertising. We have had co-operation from dealers in our district in the way of advertising, window displays, store displays, and so forth. That certainly has been effective in increasing consumer demand. We have secured a fifty per cent. or better distribution of the biscuit in the better types of stores in our territory. That is a steadily growing proportion.

We have sought to impress upon the product in our work in this territory the name Kellogg's Whole Wheat Biscuit. I have never heard it called Kellogg's Shredded Wheat. I have never seen any dealer advertisements of it under that name. I would not say that the Niagara shredded wheat has a hundred per cent, distribution in our district. Neither product is distributed in all these types of stores.

The selling points or features we have emphasized in pushing the sale and creating a consumer demand for the biscuit are: The size of the biscuit, fitting into a cereal bowl without having to be broken; that it is more porous, that it is toasted on both sides, fifteen biscuit to the package, twelve and a half ounces to the package. None of the Niagara biscuit that I have ever seen has been toasted on both sides.

Since the National Biscuit Company has had shredded wheat, in the last few years, they have not practiced the same methods of creating consumer demand for that product that the Kellogg Company has for this in our territory. I have heard they left a few samples with a grocer occasionally. They did some newspaper advertising last year. Otherwise, our men have not encountered their competition in any strong way in the biscuit field, in the advertising.

They have no force comparable to our force of salesmen working on Saturday sales, demonstrations, and house-to-house work, etc. We have much stronger competition to encounter on the sale of Corn Flakes than in connection with the sale of Whole Wheat Biscuit and shredded wheat.

I would say that there has been a change in the attitude of the groce toward his customer and of the customer toward the grocer in recent years. The old-line grocer was doing more or less of a credit business. Every grocer used to know his own customers. Today, the housewife does more shopping. She is a sort of free-lance, knows where she wants to go. Nothing would make her stay with a grocer she was trading with unless it would be confidence in him.

Kellogg's Whole Wheat Biscuit has gone into both the old-fashioned and new-fashioned type of stores. There are a few Piggly-Wiggly self-service stores around Philadelphia, about sixteen of them. It is a new type of store just beginning to come into the East. There are also a few of them in Washington.

I have not encountered or had any reports of any confusion in the trade between the Niagara product and the Whole Wheat Biscuit. The two products

compete with each other.

Kellogg's Whole Wheat Biscuit has been introduced into the restaurant and hotel trade in our territory in individual packages, packed straight cases of sixty packages. Then we have had the combination cases of all cereals, in which there are twelve packages of the individual Whole Wheat Biscuit, a few more corn flakes and less of some of the others. That has been a familiar feature in the restaurant trade. The individual packages have been increasing in popularity. From the standpoint of the trade, the advantages are sanitation and an equal quantity served to each customer. To the manufacturer the advantage of pushing the individuals is the advertising that they give on the shelf, and getting his package before the public.

There is no physical difference between the individual packages and the sample packages, as to the contents of the package or the size. They are both the same, except one is printed "sample" and the other is printed "individual." The policy of the Kellogg Company has been to push the sale of the individ-

ual cartons of Whole Wheat Biscuit.

Kellogg's Whole Wheat Biscuit has been introduced into chain store organizations. They usually want to see a consumer demand before they stock it. There is a consumer demand for Kellogg's Whole Wheat Biscuit in my territory.

Shredded Wheat and Kellogg's Whole Wheat Biscuit have sold generally on a par as to price. If there is any difference, Kellogg's tends to be higher. We have seen them getting eleven cents for Kellogg's and ten cents usually for Niagara Shredded Wheat, unless there was a special sale.

I do bidding on behalf of the Kellogg Company for the institution trade, such as government departments, hospitals, and things of that sort. The practice is that they send out proposals. The state and the government send out proposals, and we bid on them. They have public openings. I have brought with me two typical bids, being Navy Department standard government forms bids, supply contract. This is one from the Navy Department at Washington.

(The file copy of standard government form of bid as modified for use by the Navy Department, for the supply department, U. S. Naval Air Station, Lakehurst, New Jersey, was received in evidence and was marked "Defendant's Exhibit No. 100-A.")

as modified for use by the Navy Department for bid to Supply Officer U. S. Navy Yard, Washington, D. C., referred to was received in evidence and was marked "Defendant's Exhibit 100-B.")

(The standard Government form of bid, as modified for use by the Navy Department, dated January 12, 1933, to the Supply Department, U. S. Naval Air Station, Lakehurst, New Jersey, referred to was received in evidence and was marked "Defendant's Exhibit No. 101.")

I have also handed you a small folder marked Federal Stock Catalogue, Section IV, N-C-191, July 21, 1931. Those are the Federal specifications on cereals and breakfast foods.

Under Section IV, Part 5, E-2 (h) the following: "Shredded wheat—shall be prepared from sound clean wheat without material removal of the bran. Shall be processed with or without added flavoring, drawn into fine shreds, formed and baked in oblong biscuits of uniform size and shape, weighing approximately one ounce each. Shall be porous, tender, crisp, and of excellent flavor, free from rancid, musty, or other undesirable taste or odor. Shall contain no dirt, grit, or other extraneous matter." They usually state in the bids that it must come under the standard Government specifications, N-C-191.

In Defendant's Exhibit 101, item number 66, reads: "150# Cereal, Wheat, to be Kellogg's Whole Wheat Biscuit 24 pkg. to case, each pkg. contains 15 biscuits, net weight of contents of each pkg. is 12% ounces." That item was inserted in the bid by the

Kellogg Company. I put that in there.

In Defendant's Exhibit 101, the mimeographed paragraph under materials and workmanship, etc., reads: (A) Cereal, Wheat. Shall be made in a proper manner from good quality wheat, shall be shredded and in biscuit form, and mist be clean, cooked and evenly toasted on one or both sides. Shall be similar to and equally as acceptable as the product manufactured and distributed by the "Shredded Wheat" and "Kellogg Whole Wheat Biscuit" respectively. That was in the bid when it came to me, put in there by the Government.

Defendant's Exhibit 100-A contains, under Schedule 1009, in the mimeographed request for bids, the following:

"65. Wheat, Cereal, E-2 (H) Kellogg's Whole Wheat Biscuit, 150 lbs." That was in the bid when

it came to us, with the exception of the typewritten part: "Kellogg's Whole Wheat Biscuit" and so forth. We inserted that. E-2 (H) refers to the specifications which you read.

(The Federal Standard Stock Catalogue N-C-191, Section IV, Part 5, referred to, was received in evidence and was marked "Defendant's Exhibit No. 102.")

The Government, in asking for bids on products like Whole Wheat Biscuit, encourage competition. They put the proposals to get competitive bids. The State bids generally want real competition, too. They encourage it.

The Kellogg Company gives no allowances to re-

tailers who advertise its products.

We use cellophane-front packages in the sale of Kellogg's Whole Wheat Biscuit in this territory. That has been a popular feature. The product is marketed to the retail trade in this territory through the jobbers. The National Biscuit Company Shredded Wheat is marketed to the retailer direct, to a majority of them. They once distributed through the jobber. They sent out a letter in December, 1930, advising the jobber they were going to sell from their wagons, just the same as they do their crackers and cookies. That policy has been followed by the National Biscuit Company since then. Our distribution on Kellogg's Whole Wheat Biscuit in this territory, as far as the whole-sale trade is concerned, is 85 to 90 per cent.

The same methods I have described for the purpose of introducing the product to the attention of consumers and creating consumer demand for it in this territory have been used on other Kellogg's products. We se the same methods on our whole line.

There are red stickers on Defendant's Exhibit 100 and Defendant's Exhibit 101, reading: "Notice:

All the items that we are bidding on are in accordance with Government Specifications on cereals, No. N-C-191. Kellogg's Sales Company." It is now our practice to put those stickers on the bids when they are returned.

CROSS-EXAMINATION.

THE WITNESS: I went with the Kellogg Company a very short time after Mr. James F. O'Brien, left the Shredded Wheat Company, which was about 1910. Mr. Clarke in some of his questions referred to Niagara Shredded Wheat. It was always known as shredded wheat made at Niagara Falls. It was known as shredded wheat. There was nothing else then known as shredded wheat. It was not until 1928 that the Kellogg Company began to make their Whole Wheat Biscuit, which they then called Shredded Whole Wheat Biscuit. They put out a biscuit before that, that was of a little different type, the biscuit I referred to on di examination as made of dough. That was about 1915 somewhere in there. It was a biscuit shredded different, but it was more compressed. It was originally in dough form, if I remember correctly. It was passed through a grinder and was shredded. It may have been flavored. That biscuit did not achieve any great measure of popularity. I do not recollect the Kellogg Company starting to make Whole Wheat Biscuit similar to shredded wheat in 1921. The only biscuit I can remember is the one in a more compressed form than this. In 1921 I was either working out of the Boston office, or I was in Richmond, Virginia. was with the Kellogg Company and have been with them continuously since 1910. I cann recall ever hearing about or seeing a biscuit resembling Shredded Wheat in or about 1921 or 1922. I have visited the main plant in Battle Creek. I was not stationed there. I have always been in the field.

It was about 1928, that the Kellogg Company put out the nine-ounce package of the more porous biscuit, substantially like the one we now call Whole Wheat Biscuit. It has not been substantially changed since that date. It was in a package like Plaintiff's Exhibit 166, which was used a year or a year and a half, beginning about 1928. The next pakage was like Plaintiff's Exhibit 165, which followed Plaintiff's Exhibit 166. It was used approximately a year, or a total of about two years or more for the two packages, in which the biscuit was called Kellogg's Shredded Whole Wheat Biscuit. Plaintiff's Exhibit 165 was extensively marketed in this territory, started in here and was more extensively used than the last one. It was advertised. I do not remember seeing any cuts of that package. I would not say there were such cuts or were not.

The methods of promotion I described to Mr. Clarke applied mostly to this other twelve-and-a-half ounce package. There was more extensive work done on it. We did house-to-house sampling and held Saturday sales, and the other features I have described were used in promoting that biscuit.

The change in which the word "shredded" disappeared from the front of the package and it became Kellogg's Whole Wheat Biscuit took place about three years ago, somewhere around 1930. Plaintiff's Exhibit 159 represents the package in use around that time. I recognize it as a Kellogg package in use in 1930 or 1931. It has been around two years since I have been using that package. Kellogg's Whole Wheat Biscuits are marketed at present in packages like Plaintiff's Exhibit 159.

I recognize the package, Plaintiff's Exhibit 161. That is the cellophane-front package. I think we started it in the fall of 1931. We had some in 1931.

The window package in 1931 carried the same printed matter that Plaintiff's Exhibit 161 does. I am not sure. Looking at the end of the package, I could not tell you about that. These little changes come on the package. It either has: "Biscuit thoroughly toasted." or "Fifteen biscuits." That could be put on. On the ends of Plaintiff's Exhibit 168, there is a little difference in the phraseology of the printed matter there. As far as the biscuits are concerned, the picture of the dish with the biscuit may be a little different in the lithography. There is a difference in the drawing, a difference in the dish used, and a difference in the perspective. This biscuit is a little browner than the other one. That could be a little difference in the lithography. The biscuit shown on Plaintiff's Exhibit 161 are browner. Plaintiff's Exhibit 168 looks like the later of these two packages to me. Mr. Clarke says that he thinks the brown one is much later. It may be. I cannot just offhand carry in my mind a picture of it.

I would say that the cellophane front was put on in the fall of 1931. This open-easy top has been out a little more than a year. I think we started that package in 1932. Plaintiff's Exhibit 161 came out sometime in 1932. I just do not remember the date. We started the easy-open packages about that time.

I could not tell you whether the new printed matter on the ends and the new picture of the dish came out at the same time the easy-open package was first used. At any rate, packages like Plaintiff's Exhibit 161 are now in use in this territory. No packages bearing the designation Kellogg's Shredded Whole Wheat are now sold in my territory, that I know of. There may be isolated cases. If you say that Plaintiff's Exhibit 215 was picked up in an American store recently in Philadelphia, I would not be disposed to dispute you.

It resembles Plaintiff's Exhibit 166. There might be isolated cases where one of those was still out. It might be that, as you say, this package was picked up in a store on North Tenth Street in Philadelphia recently, referring to Plaintiff's Exhibit No. 216.

The piece of cardboard you show me looks like a liner to me. It is a liner that might have been in Plain-

tiff's Exhibit 166.

Referring to the 1915 biscuit, the flat biscuit, I think it started out in Portland, Maine. I was in New England at that time, and I think we pushed it right lively in New England, using general advertising and sales efforts. It was known then as Kellogg's Toasted Wheat Biscuit. I have not seen it called shredded wheat. I do not know. It was not called shredded wheat at that time. I had to do with the sales of it. I was in New England at that time. I would say it was an item that competed with shredded wheat. It was on the market several years before it was withdrawn. I would think that item was eventually withdrawn from the market, because of its lack of popularity, which I would assume was because of its being in that compressed form. That one did not have consumer acceptance at that time. It was a war-time withdrawal, when they could not get wheat. It was made of wheat, and that probably was the reason, that they could not get wheat during the war. I was just a salesman at that time and did not know the ins and outs. We sold quite a little of it until they withdrew it. The Kellogg Company does not usually withdraw a popular item, but there were extenuating circumstances connected with that. It was during the war, and they probably could not get the wheat. The time came when they could get wheat, but they did not renew the item then. When I say we have fifty per cent. or better distribution in the better class of stores, I do not mean that that includes all possible outlets in my territory. The distribution

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is there in some quantity, but I do not mean that there

is an equal amount sold in all those outlets.

I have no way of knowing whether shredded wheat is still outselling Kellogg's biscuit in this territory. I have no way of knowing, because the National sells its shredded wheat from its own truck, and I would have

no way of knowing.

At the time that the National Biscuit Company withdrew shredded wheat, in part, at least, from the jobbing trade, we already had the distribution on Kellogg's Whole Wheat Biscuit. All our business has increased. I cannot say that we have done any more with this line, the Whole Wheat Biscuit, than we have with our other products. It may possibly be that the absence of shredded wheat from the jobbing houses has offered Kellogg's a splendid opportunity for the introduction of their Whole Wheat Biscuit I could not say whether it is true, because I do not know. I am in charge of that district. I think that is very true. Our sales have been increasing, because we have put effort along with the merchandising. There are some jobbing houses which carry our product and do not carry any shredded wheat.

We are quite particular to introduce the product as Kellogg's Whole Wheat Biscuit. That has been the case since about 1930. I am so emphatic in stating that we are popularizing that name for it, because that is the name of it. There is no confusion between the two, in my opinion. I do not say that there is no confusion whatsoever or no possibility of confusion in the public mind. There is a different package there, of a different shape and different color entirely. We are selling our own merchandise by what we call it. Both products are wheat, shredded, in biscuit form. As far as the shreds are concerned, they look somewhat alike, but the biscuits do not look alike. Ours is an entirely dif-

ferent shape from the others. It is a pillow-shaped biscuit, but it is more or less of an oval shape. The bottom part is almost as round as the top part. You can look at the two, and you will see a vast difference in the shape of the biscuit. For a person standing up, looking down at it, be will, of course, only see the top, which is oval. It has square corners. You would call it a pillow-shaped biscuit. It is not the same shape, in that it is flat on the bottom. Our's is oval. Ours is rounded on the top and cottom, and shredded wheat is round on the top and flat on the bottom. Thus, a cross-section of Kellogg biscuit, both top and bottom, would show an oval shape. That is what I mean when I say it is an oval-shaped biscuit. That does not appear readily when you look at the biscuit in a dish. You see both the same shaped biscuit, then. Looking down on them from the top, they are both pillow-shaped biscuit.

I did not mean to say in answer to Mr. Clarke's question that I never heard the Kellogg biscuit called shredded wheat biscuit. I surely have. I presume people sometimes ask for it as Kellogg's Shredded Wheat Biscuit. I have not seen it advertised as Kellogg's Shredded Wheat Biscuit. The dealers may have, when that package was out. I recognize the easel or study you show me as one of our ads. I do not think we put any of them out recently. I may have a few of those around, but they are obsolete. I would not be disposed to dispute you if you said it was recently picked up in this territory. I do not know how long it might have been in use. I could not tell you how many were put out in this territory. Some of them may have been put out last year or the year before. I really could not recall just how many were sent to me or how many I still have. They are supplied to me through Battle Creek. Plaintiff's Exhibit No. 218 is the easel you have just referred to.

I do not think I have made any attempt to recall cards like the easel, Plaintiff's Exhibit No. 218. I did

not know there were any of them out.

Plaintiff's Exhibit 219 is evidently one of the company's ads in the Reading Eagle, Thursday, March 31, 1932, published by the Kellogg Company about that time. That was quite extensively used in the towns in Pennsylvania that had it in. It is called shredded wheat, and it also says Kellogg's Whole Wheat Biscuits.

I also recognize Plaintiff's Exhibit 220 as one of the ads from the Reading Eagle for May 5, 1932; and I recognize Plaintiff's Exhibit 221 as a sheet from the Reading Eagle of March 17, 1932, containing one of the company's ads. Those and the other similar advertisements you have shown me were published extensively in my territory at or about the time of those dates.

The Merchants Wholesale Grocery Company in Philadelphia is one of our customers. They are a regular jobbing house, sponsoring a co-operative group. I think they put out a price list and I recognize Plaintiff's Exhibit 222 as the price list of that store. It looks like the one they put out, this one being dated June 13, 1932.

I see in column seven the expression: Kellogg's Shredded Wheat, case, \$2.00, and, in the same column, a few items below that: National Shredded Wheat, case, \$3.55; but we did not put it there. It is there but without our knowledge or request. I saw a similar list the other day and asked the jobber to change it.

John Scott and Company, wholesale grocers, are a customer of ours. I recognize the paper you show me, Plaintiff's Exhibit 223, Cash-and-Carry Bulletin, February 10, 1933. I see on the first page, in the second column, an item: Kellogg's Shredded Wheat.

William Montgomery and Company are wholesale grocers, at Philadelphia, one of the largest in the city, at old-line wholesaler, who have been in business quite a while. I recognize Plaintiff's Exhibit 224 as one of their price lists, dated March 4, 1933. That is something new with them. It carries a price list of cereals. In column four, I see, immediately adjoining each other, the items: shredded wheat, \$1.14, and below, on the next line, shredded wheat, Kellogg's, \$2.16. I think it was Mr. Dorsett, buyer for William Montgomery and Company, whom I recently asked to discontinue printing Kellogg's shredded wheat in their price list, the one you have just shown me, Plaintiff's Exhibit 224.

We have already seen one copy of the Modern Merchant and Grocery World. I think it is associated in some way with the Retail Grocers Association of Pennsylvania. It is a grocery publication, carrying price lists. They do not deal in wholesale groceries. It is just a magazine, quoting prices for various things, under the heading of Community Bulletin. I think that must be the Frankford Grocery Company. I recognize Plaintiff's Exhibit 225, being a copy of the Modern Merchant and Grocery World, dated Philadelphia, February 9, 1933. This is the Frankford Grocery Company's price list, the Community Bulletin. I recognize those prices as some of theirs. I see in column three the item: shredded wheat \$2.10; and, a few items below, I see: shredded wheat, \$2.30.

Other wholesalers may possibly have advertised or put on their price lists our product as Kellogg's shredded wheat. I have not noticed retail grocers doing it lately. I have seen it when the old biscuit was put up as it was there, as Kellogg's Shredded Whole Wheat Biscuit. I will not say it has not been done lately, because I do not see all the advertisements.

Defendant's Exhibit 100-A and 100-B, two sheets each, are from two departments of the same organization, one at Lakehurst, New Jersey, and the other the Navy Yard at Washington, D. C. 100-A, being Standard Government Form 31, did not have pasted to it when I received it the rider which is now pasted to the second sheet. That half-page rider pasted to page two of that form was prepared by my office. I sell the Government direct, not through a jobber. Where the second page of the schedule we received specified: Wheat Cereal, E-2 (H) Kellogg's Whole Wheat Biscuits, we rewrote items 65 to 68, both inclusive, item 65 reading: 150# Cereal, Wheat; "To be Kellogg's Whole Wheat Biscuit, 24 packages to case," and so forth. That was all put in by us, including the bid.

On Defendant's Exhibit 100-B, the same form, received from the Supply Officer of the United States Navy Yard, Washington, D. C., I likewise rewrote and pasted the sheet that is now on the back of the first page, which is pasted over that portion of the original request for bids reading: Shredded Wheat, Type E-2 (H) Wh. wheat 100 lbs. I rewrote that to read: 100# Shredded Wheat, to be Kellogg's Whole Wheat Biscuit, and so forth, as it appears on this half sheet. I submitted that bid. We very likely received the award. I could not say just on that particular one, dated March 17, 1933. Sometimes we do not get it. I could not say whether we got that one or not. This is on March 11th, and we may have gotten it. I do not know if the formal contract has come in or not. We frequently get awards on the bids so prepared. The Gov-. ernment sends a formal contract for that.

Defendant's Exhibit 101, which appears to be on the same standard form 31, as modified for use by the Navy Department, is from the Supply Department of the United States Naval Air Station at Lakehurst, New Jersey. We inserted the wording after Wheat Cereal: Kellogg's Whole Wheat Biscuits, in there. On the second sheet, as received by us, items 66 to 69 inclusive, simply read Wheat Cereal, 150 lbs., and we filled it in Kellogg's Whole Wheat Biscuits, and the price. Then I also pasted on a rider, referring to the same item 66, Cereal, Wheat, to be Kellogg's Whole Wheat Biscuit, and so forth. That was put on by me. I could not say whether we got that contract. I did not look it up. It is dated January 18, 1933. Perhaps I did. I do not know how the National Biscuit Company bids on that. We bid a net price there and it is the lowest net price that gets the business. We try to get it. We put a low bid.

I see some of the prices usually bid by the National Biscuit Company on shredded wheat contracts. I do not attend all the openings. Looking at the Supply Contract on the same form, addressed to the Supply Officer, Building 83, U. S. Navy Yard, Philadelphia, I cannot say I ever have received them from the Philadelphia Navy Yard like that. Most of them have it up there in mimeographed form. I have never seen it like this. I never submitted a bid for supplies to the United States Navy Yard at Philadelphia. I could not tell you if our product finds its way into there, because I do not bid on it. Jobbers may bid on it, but I do not.

I see on the reverse side of this form: Specification, Shredded Wheat, see the detailed requirements of the above specification, E-2 (H). That is the paragraph we introduced this morning. When I get a specification like that, my practice is to bid on it, Kellogg's Whole Wheat Biscuit, putting a rider on, if necessary. Some of them do not ask for a rider. I do not know what I would do in this case, because I have never bid on it. I would type in there Kellogg's Whole Wheat Biscuits.

I do not recognize the batch of mimeographed papers entitled: Price Bulletin of Provisional Contracts for month of March, 1933, United States Navy Yard, Philadelphia, because I do not get them. I do not bid on them.

Price Brothers, 118 North Delaware Avenue, Philadelphia, is one of our customers and carry our biscuit. I see their name down there as one of the bidders, I presume, on contract 12879-C, awarded to Price Brothers. On page four of the body of that, under cereals, I see Shredded Wheat, at eleven and eight-tenths cents a pound. I do not know whether that is Kellogg's biscuit at that price. This is the first time I have seen it. I have no knowledge of that. I do not know that Price Brothers have bid on the United States Navy Yard contract to supply them bis-L' cuit. They buy the goods. Where, when, how, or at. what price they bid on them, I do not know. (The standard form of bid was marked "Plaintiff's Exhibit 226 for Identification," and the Price Bulletin of Provisional Contracts was marked "Plaintiff's Exhibit 227 for Identification.")

I have not bid on the Navy Yard at all, in Philadelphia; but I do bid on other state institutions, not all. I do not take on the Philadelphia Navy Yard business because I have no facilities for servicing them. It is about six miles down there, and I cannot make deliveries as they would want them, for ships coming in at different times.

We deliver to Lakehurst by freight. I have no facilities for making delivery to the Navy Yard. I cannot ship it to them by freight direct, because there is no freight station down there. It is in Philadelphia. We have advertising trucks or cars, but no large trucks. I have no facilities for anything they want in a hurry, and I never bid on it. They have never sent me a bid. I have never asked them for one.

The display package with the cellophane window is valuable, all right, but I do not say it is one of our best selling points. It is one of the selling points. I said very positively the Kellogg Company gives no advertising allowances. If they ever did, I never knew about it. In the length of time I have been with them, I think I would in some way. My dealings are with the jobbers and chain store heads right in my own section. I will say positively that there are no arrangements with the headquarters at Battle Creek. I know there is no allowance given.

RE-DIRECT EXAMINATION.

THE WITNESS: I have never encountered in my territory any Niagara shredded wheat in individuals smaller than their regular individual carton. Mr. Vilas asked me whether the Kellogg Biscuit was shaped the same, looking at it from the top, as the Niagara biscuit. That is not true as to length. I was just talking about the oval. None of the advertising like the easel, which is obsolete, is now distributed, to my knowledge. Kellogg's Whole Wheat Biscuit is the name under which we seek to sell it. That is it when customers call for it.

MILTON A. GALLUP.

Deposition taken at Minneapolis, Minnesota, April 18, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am buyer for the Farinaceous Department of Griggs, Cooper Company, a wholesale grocery house, manufacturers and selling direct to all independent grocers. We have absolutely no chains, voluntary or otherwise, just selling direct to the independents. We travel about eighty-four strictly gro-

cery salesmen. We cover all the way from northern Michigan and part of Wisconsin, to all of Minnesota, all of North and South Dakota, a little of Montana, and the northern fringe of Iowa. We carry about six thousand accounts on the books, including crackers, candy and groceries. I think we have forty-five hundred to five thousand customers.

We handle both Kellogg's Whole Wheat Biscuit and Niagara shredded wheat. Taking last year's figures, we sold about twice as much of Kellogg's as of the original shredded wheat. I do not know that we have any confusion in our house between those two products. We have never had either product returned with the statement the other one was what was ordered and wanted. We get our orders by telephone, the customer coming in, or through a salesman. We call Kellogg's the Kellogg's Whole Wheat Biscuit, and we call the other one the original shredded wheat biscuit, or shredded wheat biscuit.

Our house does nothing in the matter of pushing either of these two products. They sell themselves, what the dealer asks for. I never heard of our salesmen doing anything to try to switch a user of one

product to the other.

With the exception of size, I think those two products are the same. The weight of the package is different. They are practically the same and are considered so by a great many people. Kellogg's is a little bit smaller in the biscuit form than the other. If anybody asked me what kind of biscuit they are, I would say shredded wheat biscuits. I would consider the Kellogg product a shredded wheat biscuit. The original Niagara product is also a shredded wheat biscuit. I do not know any current or other name I could call those products by than shredded wheat.

I do not recall that the Kellogg product has been ordered through us in the last two years as Kellogg's

shredded wheat. We list it. If it is called for on the telephone or a salesman writes an order for Kellogg's shredded wheat biscuit, we change the order to Kellogg's Whole Wheat Biscuit before we fill it out. I would understand that expression meant Kellogg's Whole Wheat Biscuit, because the order is supposed ao designate the case. Kellogg's is twenty-fours and shredded wheat, thirty-sixes. If a man asked for a case of twenty-four biscuit, we would take for granted that it was Kellogg's. Usually the word Kellogg's is in, because he is supposed to fill in everything pertaining to the product essential in getting the order correctly filled.

I cannot recall seeing the word original on shredded wheat cases. I term it that because, for years, it was the only shredded wheat biscuit we handled. I know it as the original shredded wheat, Niagara shred-

ded wheat, their product.

There is just a trifle of difference in the prices of the two products. I think Kellogg's is a little bit cheaper in this form. Of course, one is two dozen, the other three dozen.

Mr. VILAS: Pound by pound, Kellogg's is a little cheaper, is it not?

THE WITNESS: I could not say that it was. Our list on one is four dollars and five cents, and our list on the other is two dollars and twenty cents. I do not know what your weight is. I do not think you carry it on your package now, do you?

Mr. VILAS: We are required to by law.

THE WITNESS: I think it just calls for twelve biscuits.

Mr. VILAS: Twelve ounces.

THE WITNESS: Twelve ounces! Well, that is something new. I looked all over it a year ago and could not find it at all.

When National took over Shredded Wheat. I think they continued to deal through the jobbing houses the original Shredded Wheat Company had had. We got it just the same. I think they began to distribute it direct in our territory and sold them right along with the crackers. I so understood, but we never had much conflict with that. I do not think it produced any effect on our sales of their product. After the National began selling direct, our sales of original shredded wheat continued about the same. In some places it made a difference, because I understood the Shredded Wheat Company had a form of discount. The National, if I recall, sold at the same discount when sold with crackers.

CHOSS-EXALTINATION.

XQ. 38. Mr. Gallup, did you ever hear it called Niagara Shredded Wheat until Mr. Clarke used that expression?

A. I do not think I ever heard that expression used on it. It might have been called that, though, sometime.

XQ. 39. Up to the time that Kellogg's Whole Wheat Biscuit became a factor in the market, you never heard it called anything but shredded wheat, did you?

A. Yes, shredded wheat; that is all.

THE WITNESS: That was the only shredded wheat biscuit we had in years. I never heard it called anything but shredded wheat. That was the only shredded wheat I had ever seen. I stocked it a great many years ago. When we were selling it, they stocked it. I have

been with my house thirty-four years. I would not

know how long it has been out.

XQ. 46. In other words, shredded wheat has been a household word all through your lifetme and your connection with the business, has it not?

A. Yes. I think they stocked it since they ori-

ginally put the package on the market.

XQ. 47. Why do you suppose, Mr. Gallup, that you so readily call Whole Wheat Biscuit shredded wheat?

A. Well, I suppose they are both the same thing,

both shredded wheat biscuit.

XQ. 48. Yes, I understand that; but is it not reasonable and fair to assume that the reason you call that product shredded wheat biscuit is that you have known the other so long by that name?

A. Well, they are practically the same products.

XQ. 49. Yes, they are the same products, are they not?

A. Well, I would say they were, yes.

XQ. 50. Except for the size?

A. Yes.

XQ. 51. And it is a very natural thing, having known all your life this shredded wheat biscuit as shredded wheat, to call the Kellogg's Whole Wheat Biscuit shredded wheat; is that not so?

A. Yes, although we do call it Kellogg's Whole

Wheat Biscuit on the package.

THE WITNESS: We do now, but we have not always. We carried it as Kellogg's shredded wheat for a while and then changed it to Kellogg's Whole Wheat Biscuit. I remember the Kellogg Company originally called it Shredded Whole Wheat Biscuit. The same term, shredded, is on the package. I recognize Plaintiff's Exhibit 161, with the window, as one of the packages of Kellogg's. I see on the end, "A shredded wheat product," and "shredded wheat in its most de-

licious form." I would say they are right, because it is shredded wheat. There is no other expression occurs to me when I see a carton like that with the picture of the biscuit on that package, but shredded wheat, although they call it Whole Wheat Biscuit.

We stock Muffetts. I would not say it was a shredded wheat biscuit. It is a whole wheat biscuit made in a different form. I am pretty sure it was shredded wheat. I have not seen it for so long to see whether the wheat is in shreds like this other biscuit. I know it is coiled around. It is not shaped like shredded wheat and has never been sold as shredded wheat. We have always sold it under the trade name, Muffetts. I have not seen Loose Wiles new product, Rippled Wheat, yet.

XQ. 71. It has never occurred to you, probably, Mr. Gallup, that the expression shredded wheat has acquired a proprietary or trade-mark meaning, as designating the product that the Shredded Wheat Company had made for so many years, has it?

A. Yes, I think it has. That is what I say. We still call it shredded wheat biscuit, and, when they call

for shredded wheat biscuit, we sell it for that.

THE WITNESS: We sell it as the trade name designating the National's shredded wheat biscuit, because that is the only way it is listed. The other we call Whole Wheat Biscuit, although I very quickly say it is shredded wheat when I am asked.

XQ. 75. Is that not because of the fact that the Shredded Wheat Company have for many years past dinned that word into the public, until they know that product as shredded wheat more than anything else?

A. Yes, I say that they have brought that before

the public as shredded wheat.

THE WITNESS: It is the first product of its kind that was ever manufactured, I think. They did a lot of work to teach people to know it as shredded wheat and even to teach people to like it.

My house, Griggs-Cooper Company, also manufacture crackers, candy, and jam. We are a little in competition with the National Biscuit Company. The jobbing business is run separately from the manufacturing end. We have a hundred and twenty-five salesmen, of which about forty are cracker and candy salesmen exclusively, and eighty sell for the jobbing business, although at times they sell crackers and candy.

We stock both items and try to fill orders without substituting one for the other. We try to avoid confusion. If a man wrote in for Shredded Wheat and gave no designation of the size, we would not know what he would want. Our salesmen are supposed to write in one case twenty-fours of Kellogg's Whole Wheat Biscuit or one case thirty-sixes, if they call for a case of shredded wheat. There might be a little confusion in our own mind, because we have both cases. We would undoubtedly hold that order up until we found out exactly what he wanted.

Within the last three years, I imagine people would consider there have been two shredded wheats, because they are both shredded wheat. To prevent the customer getting confused and receiving a wrong bill of goods, we would rather write and wait another two days to find out exactly what he wanted, because we do not substitute. That was not so until Whole Wheat Biscuit was produced because Shredded Wheat would be the only one he could have. If we had received then an order for shredded wheat, that is the only one we could have gotten.

We have customers call up over the telephone from the city and ask you to send a case or five cases of shredded wheat. We have to say, "Which cae do you want! Kellogg's Whole Wheat Biscuit or shredded wheat!" We would ask him which one of the two he wanted, to avoid that, because we want to avoid return freight if we can. We try to avoid confusion. If a customer writes the order himself, he is supposed to designate so there is no guessing on our part of what we should fill in on the order. If a customer, in the absence of a salesman, telephones or sends in an order for just shredded wheat, the only other check we have on it, to know practically for sure is to look at his previous orders. If we find he has previously ordered shredded wheat, we give him the thirty-sixes package. If we find he previously had Kellogg's biscuit, we take it for granted that is what he wants. We try to avoid confusion. There is no confusion in our minds, but we might sometimes give the man the wrong product, different than he thinks he is going to get. There might be some confusion in his mind by ordering carelessly under the old trade name; but we go back to the salesman or the customer. If he asks for shredded wheat, we do not fill it until we know absolutely what he wants. So it is true that some confusion might arise. We know the difference and try to keep it straight with our customers.

RE-DIRECT EXAMINATION.

THE WITNESS: I do not think or recall that the question of large or small shredded wheat has ever come up. I know the picture of Niagara Falls has been on that package. It was on the original shredded wheat years ago. When you referred to that package as Niagara shredded wheat a while ago, I had no doubt what you were talking about. I knew the one you meant, made at Niagara Falls.

RE-Cross-Examination.

THE WITNESS: I remember and recognize the old package you show me, Plaintiff's Exhibit 10, with the picture of a dish on one end. I have sold a lot of those.

We have sold it ever since it came out. I remember the dish on the end of the package. I think it was used for several years. I did not notice much difference on the label at all until recently. I think it has been the same package. I see that, and I see Plaintiff's Exhibit 1, which, in addition to the picture of the factory, has a picture of the biscuit on the outside. I have been familiar enough with the product itself so I can say the appearance of the biscuit, its shape and size, have always been the same. I would say there has been no change, to my knowledge.

RE-DIRECT EXAMINATION.

The Witness: My house services restaurant trade somewhat. We have some accounts we sell to restaurants. We handle both products in individual packages for restaurant and hotel trade. We sell them mostly that way to institutions. The marketing of cereals in these individual packages has become rather common in the trade. A great many institutions use them now in place of the larger packages. That custom has existed several years. It has been of comparatively recent growth within the last few years, just grown gradually. I cannot say it is very large with us, but it is a big business, the restaurant and institution business in individual packages.

We handle the complete line of Kellogg cereals. I do not recall when Kellogg's corn flakes were known simply as Toasted Corn Flakes, before the name Kellogg's was put on.

RE-CROSS-EXAMINATION.

THE WITNESS: We enter into competitive bidding for institution business. They will send out a list of items they expect to buy and ask for bids on them. Sometimes those lists contain an item for shredded

wheat. It is usually called for by name. If they ask for shredded wheat, they either have the size, a case of thirty-sixes or fifties. If so, we try to find out from them what they really wish on the bid. If we get an invitation to bid on shredded wheat, we do not know what is called for, whother to bid Kellogg's or the National. Unless they call for Kellogg's shredded wheat, it would be two bids. We would have to find out whether they wanted Kellogg's biscuit or the original shredded wheat. If they called for shredded wheat, I would want to find out which one they meant. We have found sometimes they call for shredded wheat biscuit twelve-and-a-half-ounce package. The only one to fill that order would be Kellogg's biscuit. If other orders came in calling for a case of thirty-sixes, we would have no doubt which to bid. If it comes in with other designation, we just try to find out, as we do with other customers.

RE DIRECT EXAMINATION.

THE WITNESS: We would assume it might be Kellogg's, because we do not want any changes, any trouble in filling the order correctly. I do not think we have had any instance in which we have bid and had the institution reject what was delivered, as not being asked to bid on.

OSCAR H. LANDIN.

Deposition taken at Minneapolis, Minnesota, April, 18, 1933.

DIRECT EXAMINATION.

THE WITNESS: I have no occupation now. Until two weeks ago, I was connected with the National Tea Company, a chain store organization with a total of seventeen hundred stores. I was branch manager in Minnesota territory, with about two hundred and ten

stores under my management, located in Northern Minnesota, North and South Dakota, and Wisconsin. The other stores are in the East, Illinois, and Michigan. Those are service and self-service stores, cash and carry. In some of them, people can take goods off the

shelf, pay for them, and go out.

The stores in this branch handle a product known as Kellogg's Whole Wheat Biscuit and also carry the Niagara or original shredded wheat. There is a consumer demand in those stores for the Kellogg product, The two products sell nearly fifty-fifty, up to within the The demand for Kellogg's is increasing more rapidly. We have only handled it in the last two or three years. Two not remember when we put it in, but it has been growing, and more rapidly than any change in the demand for the original shredded wheat. I would not say it has been growing any faster, but maybe it has. Starting from nothing, it has gone up to fifty per cent. We have handled shredded wheat for years, as long as I can remember. The last year, the two products sold about equal. We have a shelf price of two for twenty-three on shredded wheat and twelve on Kellogg's, except on a sale. In single package, the price is the same. On two, Kellogg's would be half a cent higher.

Our organization has done nothing to create that consumer, demand for the Kellogg product. We may have advertised it a few times, but not very much. We do not consider we have done anything substantial. We have given the Niagara product about the same treatment as Kellogg's. They are both on the shelf. usually on the ledge. Neither is displayed, except that. Customers ask for them by name: shredded wheat, and Kellogg's Whole Wheat Biscuit or shredded wheat. I have never heard of either one being returned with the

statement it was the other one they wanted.

Our stores do not practice substitution in any way. If a customer asks for a product they do not have, they might substitute one if they did not have the other. If a woman asked for Royal Baking Powder and they did not have it, they might try to sell her Rumford's or Calumet. That is what I meant when I said they might have substitution. The clerks or managers would not show any preference for one or the other! I would call it substitution if a clerk said he did not have Royal but had Rumford's or Calumet. They are supposed to sell them something else similar. I would not regard that as deceptive or fraudulent substitution. They are instructed to sell something. If the customer wants baking powder and they are out of one, they are supposed to try to sell some other brand. I think that would be a natural thing for anybody to do. It is not substitution to try to substitute one product for the other.

If a customer had no experience with it and asked me what Kellogg's biscuit is, I do not believe there would be any difference. They are both a shredded wheat product. I have eaten both of them, and I do not know that there is any difference in them. I do not regard the practice I have just described in regard to baking powder as illegitimate or improper, because I

would want to make a sale.

Some but not all of our stores carry the National Biscuit cracker line. We have two different biscuit companies. I do not think we have had any demonstrations of Kellogg's biscuit. We had to make up an ad on it occasionally. We have had no Saturday sales I know of, with a salesman and a combination of two or three packages sold with one free. I do not think we have had that, though it might have been without my knowledge.

The Kellogg name is so well known, on account of experience with other Kellogg products, that it helps introduce the biscuit to the trade as a new product.

The sale of shredded wheat biscuit, original or Kellogg's, does not compare in volume with cereals like Corn Flakes. It is a comparatively small seller. No comparison with Corn Flakes at all.

CROSS-EXAMINATION.

The Witness: Until a week or so ago, I was manager in charge of the National Tea Company's general group of stores in this unit. We have a headquarters and warehouse here, where we stock several items for distribution to our retail members. I was in charge of that. I had been with them twenty years, nearly my whole business life, in various positions, from store manager up. I had been a manager in the retail store itself and worked up until I was manager of the branch.

All my life I have been familiar with shredded wheat. It is an old product. I have had it a long, long time, have had it at home, and it was always called shredded wheat. The Shredded Wheat Company spent a lot of money introducing it as a new product, and I know they advertised it extensively, but I did not pay any attention to the advertising of it in the early days. I know it had been made almost a household word by propaganda advertising and educational advertising, teaching people to know it as whole wheat and to call this product shredded wheat. So, when the Kellogg Company came out with a product very much like it. while it did not have that name on it, as far as I know, the product is the same. I could not see any difference. There is a difference in size, but the two types of product are the same. The filaments or shreds are the same. I could see no difference.

'Having been familiar for at least twenty-six years with shredded wheat, it is very natural, I suppose, to some people, to call Kellogg's biscuit shredded wheat. I would not myself take it that way, but I do not know

what the public would think about it. It is shredded wheat. It is similar in taste and a biscuit that will fill the same order. To that extent, and taking out the doubtful meaning of the word substitution that counsel put into it, it would mean a substitution of one for the other, with the knowledge of the customer, just as if I did not have Royal Baking Powder and would try to sell her another. It would be natural to do it, quite natural that one should be sold for the other, and vice versa. If they came in and asked for Kellogg's Whole Wheat Biscuit, if I did not have it, I might offer them shredded wheat. If a customer came in and asked for Kellogg's shredded wheat, I would know what she meant. I know they call for them by name. Some purchasers are careless about names. There are all kinds of ways. Some might be largely confused between the two. When I said there was no confusion between the two in my store, I meant I and my clerks and managers all know the difference. I would not make the mistake of picking up one for the other.

By the sales of Kellogg's biscuit jumping in a couple of years to a parallel with those of shredded wheat, I suppose Kellogg must have built a demand for it. They have done some newspaper advertising. I do not know about samples. I do not do buying, so I do not know about special deals or introductory allowances. I know the sales were near fifty-fifty last year. I have made no investigation for the purpose of being accurate, but I know Kellogg has grown and it is somewhere near that. It has grown from nothing in a couple of

vears.

XQ. 105. Do you not think that that growth may be accounted for, in part, at least, by the fact that it is like shredded wheat biscuit?

A. Well, I do not know. It is like it, and I suppose it would—I cannot answer that. I do not know the reason of it.

XQ. 106. It is not natural? Here you have had a product that you have known for twenty-six years, and that has been known for longer than that, which has been advertised so that every household, practically, knows what shredded wheat is.

A. Yes.

XQ. 107. Now, if you have another product, almost indistinguishable from the well-known shredded wheat, would it not be easier to sell that than to sell something that is brand new?

A. Oh, I imagine it would.

2. RE-DIRECT EXAMINATION.

The Witness: I do not think I have ever heard a customer say why he liked the Kellogg biscuit. I have used it myself. I did not use shredded wheat for many years. I have eaten both of them since I have been out, because I am quite a wheat fiend.

There is a little difference in size of the biscuit. Theirs is a little smaller biscuit. The packages are not alike. I would not confuse or mix up one package with the other. Defendant's Exhibit 4 is the general type of package I handled with Kellogg's Whole Wheat. I have not seen any packages with a cellophane front.

RE-CROSS-EXAMINATION.

The Witness: Our retail units just use newspaper advertising and handbills. We have advertised Kellogg's Whole Wheat Biscuit several times. As far as advertising goes, I think we have advertised shredded wheat a good deal more. I do not think we advertised either one very much. I do not think we have given more advertising to Whole Wheat Biscuit in the last two years; because we have cut shredded wheat several time to ten cents a package. Kellogg's is twelve cents. I do not know whether we have advertised Kellogg's for ten cents or not.

CLIFFORD F. GUYER.

Deposition taken at Minneapolis, Minnesota, April 18, 1933.

DIRECT. EXAMINATION.

THE WITNESS: I am buyer for the Slocum Bergren Company, wholesale grocers, an old line house
with traveling salesmen, a little different now. We are
mostly on a co-operative group plan now. We have
two salesmen. Most of our orders come by mail and
telephone. The co-operative group is the Red & White
Stores, uniform front stores of those colors. They are
just around this section here, but you will find Red &
White Stores all around the United States and Canada. This particular unit is in a small part of Minnesota, some parts of South Dakota, and a small part
of Wisconsin.

In servicing those Red & White Stores, we carry Kellogg's Whole Wheat Biscuit, and we also carry the original shredded wheat. - We have no mix-up or confusion at all between those products. We have listings of those items to our members, who order them out in the regular way. We have no reason to be confused. We list shredded wheat as thirty-sixes and twelves, and Kellogg's Whole Wheat Biscuit as twenty-fours. The orders come in by name and number of packages to the case. If we got an order for shredded wheat twenty-four to the case, we would possibly investigate it. I do not recall having trouble of that sort. We have trained our members and they refer to their listing. They are correct in ordering. They ordered twenty-fours, and, if they did, they would get Kellogg's. I know of no instance where one has been sent back with the statement that the other was ordered and wanted. We have not been troubled that way, because we have different-packed cases.

We have handled the original or Niagara shredded wheat biscuit for many years. I know what you mean when you say Niagara shredded wheat. You refer to Niagara shredded wheat, the original shredded wheat, which is the way some of our members seem to look at it. I would know the name Niagara in connection with it. The old original shredded wheat we used to buy direct, the same as any other product. We now buy it direct from the National Biscuit Company, and the retailers can buy it direct. I think the retailer's scale of discount is a quantity discount, which figured down as low as the discount to our wholesale house.

Personally, having been in the trade myself years ago, I found that, in this particular market, the National Biscuit were not in so good favor with the general retail trade, due to the feeling that the larger buyers had an advantage over the small buyers in the discount.

I would not think it would be possible to substitute a Kellogg package of Whole Wheat Biscuit for the Niagara shredded wheat biscuit and make the customer think she really had the shredded wheat. From the consumers' standpoint, it seems to me if the consumer demands Shredded Wheat, that is all they want.

CROSS-EXAMINATION.

THE WITNESS: If the grocer really set out to deceive a customer, he perhaps could go so far as to say: This is shredded wheat, and Kellogg's have taken them over. They have a biscuit that really looks like shredded wheat biscuit, so it would back him up; but I do not think the retailer, with the many items he has to sell, as busy as he is, is trying to push one product and deceive his customers. Most retailers, I think, have learned better and are giving them what they want.

There are several hundred stores in the Red & White unit we service. It has now come to be the major part of the business of my house. We do have, however, those not in the unit group and have city salesmen for that purpose. It is true that the Red & White is at present the major part of my house's business. We purchase Kellogg's Whole Wheat Biscuit and stock their cereals, which we hold in our warehouse for the purpose of distributing them to our stores as needed. We do not have store managers; it is an individually-owned chain group. The individual store owners purchase them by mail and telephone, with reference to our list. They are all supplied with our list, and, with it beside them, they can order items as they want them, which is what I meant when I said there is no confusion between those two biscuit. Our store owners know them and know what they should call for. The people in our house know the difference. I, myself, am not directly in contact with the retail outlets. I am not in a position to say exactly whether fhere is any confusion in the minds of the public between those two biscuit. I do not contact the retail stores direct. I am just inside. I have been with Slocum Bergren twenty-five years. It is safe to say that I have known shredded wheat longer than that. Up to a year or two ago. I guess there was nothing else that was called shredded wheat. In fact, I never heard it called Niagara shredded wheat or the original shredded wheat, or anything like that, until just recently. It was just shredded wheat; and it was a household word, known to pretty nearly every housewife in the country, I presume. It was generally known. I would say my house sells considerably more shredded wheat than it does Kellogg's Whole Wheat Biscuit. We are a regular buyer of it from the National. I would say the proportion is at least two or three to one, in favor of the National shredded wheat.

We stocked practically the complete Kellogg line, and, when the Whole Wheat Biscuit came out, we naturally took that in with the rest, because it is a popular line and the consumer takes it up readily. We are selling it, and I account for the demand because it is an item that I think would fit in with the Kellogg line. It is a cereal, breakfast-food item. I imagine it is very similar to shredded wheat. I have been familiar with both products and have seen Kellogg's biscuit and eaten it. There is some difference between the two. Personally, I have no preference for either. Either one satisfies me. If I wanted to be fussy about it, I could see a difference, and I could pick one from the other.

If a retailer were out of shredded wheat when asked for it, it would not be very difficult for him to induce a customer to try the other, depending on the retailer. It is possible.

RE-DIRECT EXAMINATION.

The Witness: We have no rule forbidding Kellogg salesmen to go into individual stores for Saturday sales or demonstrations. It is the retailers' own rule, not ours. This is a co-operative group, and all these rules have been gotten up by the retailers. They have a committee which lays out the plans. One of them is they do not have specialty men or give specialty orders. Everything is done through jobbing houses. The specialty men have not been able to get into our stores and have not been able to arrange to hold Saturday demonstrations or have store or window displays. Nothing has been done. Whatever consumer demand has been created has been without any special store work of the Kellogg Company.

RE-CROSS-EXAMINATION.

THE WITNESS: We attempt no exercise of directory power over the salesmen of those stores. If they have a call for shredded wheat, we have it. If they want Kellogg's biscuit, we have that, too. It is up to them for their stores. The committee does not attempt to influence them at all. Theirs is purely buying co-operation. Their committee meets and chooses their specials. We meet with them and we naturally work with the layout; but they have their own choice of specials. They handle very few of the National Biscuit crackers. Most of them, through their committee, have connection with Loose-Wiles. Our house does not attempt to dictate that, at all. The cracker salesman does service stores. In contacting the stores, I do not know whether the National men get into some of them. Our house has had no occasion to be particularly friendly or unfriendly with the National in past years. The Red & White Company made this affiliation with Loose-Wiles on cookies and crackers. Naturally, they have worked that connection. We do not attempt to handle anything in the cookie and cracker line. We stock nothing in that line.

RE-DIRECT EXAMINATION.

THE WITNESS: I told you our members, as an independent group, do not favor the National on account of its trade discounts. That was in the minds of the dealers when the Red & White began to function. Now, when we started the Red & White, they made their affiliation with Loose-Wiles. Naturally, all the buyers get their cookies and crackers through that connection.

CARL O. JOHNSON.

Deposition taken at Minneapolis, Minnesota, April 18, 1933.

DIRECT EXAMINATION.

The Witness: I am buyer for the Twin-City Wholesale Grocery, strictly and purely a co-operative organization. The retailers actually own it. It is a collectively owned organization. Out of our St. Paul office, there are about seven hundred and twenty-five unit members. We have another branch office at Fargo, North Dakota, and three other branches. Our head-quarters are in St. Paul. In many instances, our stores operate as Fairway Stores; in others, under their own individual names. We would rather have them do that. It is not a uniform-front proposition throughout. Our house buys for these various units who are owners of our organization.

We handle Kellogg's Whole Wheat Biscuit. We also have the other product, which is called, in our house, shredded wheat. We have no other name for it. We sell them both as shredded wheat. We list them both under the name of shredded wheat in our cost book, the only difference being that the Kellogg brand is listed as Kellogg's shredded wheat. We have no confusion between those two products in our house, have never had either one sent back with the statement it was not what was wanted or had been ordered,

that I recall.

This morning I saw our city desk man. We travel only four men in the outside territory. All our telephone business is taken care of by thirty desk men, for the city business locally and long distance calls. I inquired this morning just how those orders come in. They told me they either specify Kellogg's shredded wheat or Niagara shredded wheat, or honeymoon

shredded wheat, associating, I suppose, Niagara Falls

with honeymoon trips.

I dug up the figures of sales on both products for the last six months. We had four hundred and fifty cases of the original shredded wheat, as we call it, and three hundred and thirty cases of Kellogg's shredded wheat, a difference of a hundred and twenty cases. Our house does not service the restaurant trade at all.

CROSS-EXAMINATION.

THE WITNESS: Our house is a purely retailerowned wholesale house. We service only our own members. Aside from that, we conduct our business just as any other wholesaler. We purchase in carload lots or quantities of that sort and store it in our warehouse and distribute it as requested, as our members have need for it. The profit they derive 1 om belonging to our organization is in the form of both better price and dividends. Our only reason for being there is to get that line of goods in and out of the house just as close as we can handle it. It is a non-profit organization, and the members profit from belonging to it by getting goods as near to the cost as they can be handled. We have no control over the operation of these various retail stores at all, other than to suggest merchandising plans, and helps for advertising. We do attempt to get them the benefit of whatever knowledge we have that they do not have. We try to give them anything we can to make them better merchants, the benefit of our experience and knowledge.

I have been in the grocery business about seventeen years. During all that time I have known shredded wheat and stocked it. Most of that time, until very recently, it has been known as shredded wheat and by no other name. It is the only one I have known it by. In answer to Mr. Clarke's questions I referred to it as Niagara and the original and honeymoon shredded wheat. I had no occasion to use those designating terms until the Kellogg product came on. Prior to that time, it was just shredded wheat. There was nothing else then with which it could be confused.

Kellogg's shredded wheat or Kellogg's Whole Wheat Biscuit has been on the market two or three years now. Since its advent, I have found it necessary to distinguish it, in order to avoid confusion between the two, by calling one Niagara or original shredded wheat and the other Kellogg's. I never get a call myself, so I do not know if our members still call and ask for shredded wheat. I presume that is the way it is handled: If a retailer calls up and asks for shredded wheat, the boys or the desk salesman would inquire what brand was wanted. That is my guess. I talked to some of the city boys today about it, and they said just that very thing, that they ask for a specification of which package they want. If the wrong one goes out, we have to pay drayage to get it back. In order to avoid confusion they ask which one is wanted. have crackers in our building, a Manchester Biscuit agency. That cracker is favored by our members. We encourage it. We are not particularly friendly to the National line of crackers. We do handle shredded wheat because there has been a demand for it, and we believe in giving people exactly what they call for. If we do exercise any influence, suggestive or otherwise, in regard to crackers, it is absolutely in favor of the Manchester.

RE-DIRECT EXAMINATION.

THE WITNESS: I have never noticed that they have the name original on the cases of Niagara shredded wheat. I pay very little attention to either one of them.

CLARENCE A. RUCKMAN.

Deposition taken at Minneapolis, Minnesota, April 18, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am district sales manager for the Kellogg Sales Company, with which I have been connected about eighteen years. I have been in this district one year. Before that, I was in the headquarters at Des Moines, Iowa. My present territory is the State of Minnesota, North and South Dakota, a small portion of Montana, and part of Wisconsin. I have fifteen regular men assisting me at present. Their duties generally are to promote the sale of Kellogg cereals in their sub-districts, in their territory. Our district is divided among eleven men. We have four special men designated from week to week to work in different parts of the district.

We push the entire Kellogg line in this district, including Kellogg's Corn Flakes, Kellogg's Pep, Kellogg's Whole Wheat Biscuit, Kellogg's Krumbles, Kellogg's Rice Krispies, Kellogg's Bran Flakes, Kellogg's All-Bran, Kellogg's Whole Wheat Flakes, and Kellogg's

logg's Kafee Hag Coffee.

Ca Kellogg's Whole Wheat Biscuit, we have been able to secure approximately eighty per cent. distribution among the better grades of grocery stores in my territory. We have probably seventy-five or eighty per cent. distribution of the individual size in the better class restaurants, not including little hamburger stands.

There is a demand for Kellogg's Whole Wheat Biscuit in my district, as manifested through grocery stores and in the restaurant trade. That consumer demand has been created through the efforts of our organization in creating such demand through our various channels of promotional work, accomplished through sales efforts, sampling, store sales, and, in some instances, direct mailing to consumers. We get lists of consumers' names and mail coupons direct to customers of grocery stores, redeemable in Whole Wheat Biscuit, one package free with the purchase of one. We have had Saturday store sales and demonstrations, etc., in the various stores as our men can reach them in turn. Our men spend a day in the local grocery store, selling a complete line of Kellogg's in that store, unless we have a special sale in that territory. For instance, we might have a special deal on in Whole Wheat Biscuit. If there is a run on it, we could sell it. The man makes a prearranged sale. In the City, buying is over by early evening. In country towns, much of the trade is from three to nine P. M. The men are instructed to stay in the stores at the times when the customers come in. The man must be one of the clerks of the grocery. He is there when the grocer is busy. The farmers work late in the day in summer and buy into the night.

In addition to these methods of the Kellogg Company, we have also done newspaper advertising, and we have also had the co-operation of the trade in doing their own advertising of Kellogg's biscuit and giving store displays. They have advertised in the newspapers and in circulars and things of that sort. Kellogg Company makes no allowance for that. It is all contributed by the dealer. Window displays are usually put in by our men. Where the dealer runs a special deal, he advertises it and makes a floor display. Our windows are put in by dummies and our own men. We have used premium cups, the Wheel of Knowledge and Jungle Land Books. Those methods we have used to create consumer demand for Whole Wheat Biscuit are the same plan of operation used in pushing other Kellogg products, with the possible exception of post cards, which we have used on Pep and some of our other products, depending upon the season and our program. Those are all generally known methods of introducing new products to consumers in the trade.

In the sale of other cereals, like Corn Flakes, we encounter the competition of other brands, tremendously. We have in this territory about twelve different brands of corn flakes competing with ours, including Post Toasties of General Foods. Fairway is another. There are Jack Spratt, Red & White, Time O'Day, Millers', Jersey, and Premier Corn Flakes. Northern Jobber Company handle a brand of corn flake. There may be others. The competition on those products is tough. The competition we have had on shredded wheat in the past two years has not been anything to compare with the corn flake competition.

As far as their promotional efforts are concerned, I know the methods or selling Shredded Wheat since the National took it over are nothing to compare with the old straight system used by the Shredded Wheat Company before. They were pretty hard competitors, extremely active from the beginning of their spring season until the end of their summer season. They had advertising cars, with two men on each car, conducted group store sales, with free package for the sale of two. In a town like Albert Lee of 10,000 population, they would conduct a week's sale, three packages of shredded wheat in a shopping bag, for the price of two. Those two salesmen would go on throughout the year. They did that for at least five years in our territory. That is a very effective method, getting your merchandise right into the housewife's pantry. Nothing has been done like that by National, to my knowledge, since they took it over. I would say that, as far as real competition in the cereal or shredded wheat field is concerned, the National Biscuit Company, since they took it over have not been offering

that competition.

In our sales effort on Whole Wheat Biscuit, and, in fact, on our entire line, unless a competitive brand is mentioned by the dealer, we never mention it. If it is mentioned, we call attention to the different-sized biscuit, fifteen to a package, being toasted thoroughly

on both sides, and a finer shred biscuit.

We feel that the Kellogg name is a great advantage in the marketing of either an old or new product, because the Kellogg Company has been existing about twenty-seven years and have always established a product of high quality. We have also used every effort to promote sales of our products for our distributors and create consumer demand for them. The Kellogg Company guarantees the sale of their products and we take them back if the products do not sell well. While we do not guarantee to any distributor the sale of a product, we always pick up any that is old or unsalable for any reason.

So far as we have been able to do it, the name Kellogg's Whole Wheat Biscuit has been impressed on our trade to sell this product to the consumer, in this territory. Neither directly nor by reports have we experienced any confusion or mix-up between those two products, by any grocers sending them back and

saying the other product was wanted.

Our company favors the marketing of Whole Wheat Biscuit exclusively in the individual package to the restaurant trade, if possible. We try to push it as much as possible. I know of nothing we could do at this time to increase the sale of Whole Wheat Biscuit in individual cartons to the restaurant trade that we have not done. Small restaurants, like hamburger

stands, would buy from the retail grocer in the large package, instead of individuals from the jobber. There is little demand for any cereals in that type of restaurant.

I think the demand for Whole Wheat Biscuit and for all types of cereals has been on the decrease since the depression, due to several things. I would say the important reason of people who eat meals in restaurants is the low prices of other food commodities and the increased operation of so-called specials or club breakfasts, for a certain price, like orange juice, eggs, toast, coffee, but no cereals, or rarely are cereals listed in most cases on a special. In first-class places, like Radisson Hotel Case, you might find them listed. Aside from that type of restaurant I have mentioned, the individuals are generally used, where there is a demand for that product at all.

In connection with Whole Wheat Biscuit, we have had the regular window set-ups and have built up displays on the regular display stand, carrying the name Kellogg's. We have used hundreds of the little display stands in restaurants. I have not encountered anywhere in my district the small-sized individual biscuit of the National in the restaurant trade. I have not called on the restaurants, and I have had no report of that small National biscuit being in the restaurants.

We have only two groups of chain stores in this district. I am satisfied we have had a 100 per cent. distribution of Whole Wheat Biscuit in the Red Owl Stores and National Tea Stores. In my experience they do not stock a product until there is a demand, although occasional groups might. I do not know what they did here, because they were stocked when I came here a year ago.

I think the retail prices of the two kinds of shredded wheat are about the same in most stores.

Some stores sell theirs a little less than ours; others, a few, might sell ours a little less than the others. The National Tea Stores in Minneapolis are selling the original shredded wheat biscuit slightly under Kellogg's, twelve on ours and two-for-twenty-three shredded wheat.

I understand substitution means giving somebody something other than the package they asked for. If a customer came in the store and asked for Royal Baking Powder and the grocer wanted to sell her something else, the general procedure would be to explain, possibly the new product in stock, and ask them to try it. Another method might be to explain the qualities or qualifications the new product had that the selfer felt the old product did not, and ask her to try it. Then the result might be called explanatory substitution. I have not heard of deceptive or fraudulent substitution, such as a grocer making a woman who was getting an imitation Baker's Chocolate believe she was getting the original Baker's Chocolate. I think that form of substitution has pretty generally died out. I have not heard of anything like that, of any type. Some years ago, wholesale grocers even substituted on small wholesale orders with a rival corn flakes instead of Corn Flakes. That has not been done recently. It has died out for two reasons, I think: one of which is that the grocer pushing out substitute goods gets them right back from the customers. I think the main channels of distribution are operated today on a more equitable and fair and square basis than they have ever been in history. I think the retailer is more honest and upright today than at any other time, say, some fifteen years ago. In the case of my friend with Kellogg's Corn Flakes, I might think it was just a mistake between that and some other kind, and yet the grocer returned it.

CLOSS-EXAMINATION.

THE WITNESS: I do not think this part of the country is stronger for private labels than other sections. This section is strong on private labels. I mentioned quite a long list of corn flakes, mostly private label corn flakes. It is so with other cereals. No doubt we are in competition with shredded wheat with our Whole Wheat Biscuit. I did not mean to infer that National is not as aggressive as the Shredded Wheat Company. Shredded Wheat is still being sold and advertised; but the letting up of any competition below the activity of a competitor would naturally give that competitor a slight advantage. If he competes, it will give him a slight advantage. If he puts forth more promotional effort in that field, he will pull more business than the other fellow. I would not say whether or not he would get the other fellow's business away. I could not say whether or not we have acquired some customers who were shredded wheat users and now use Kellogg's biscuit. I do not know that we have. We do not know of people who have used our biscuit and are now shredded wheat users or whether we have created a new demand for Kellogg's, or whether Shredded Wheat has lost any business. I would not state absolutely that every person now using Kellogg's Whole Wheat biscuit has never used the old product. Possibly some of those people have used shredded wheat and have switched to our product.

When I said we have an 80 per cent. distribution in grocery stores and 75 per cent. in cafes, I think shredded wheat possibly has a similar distribution, maybe better, in the terms in which I expressed them. When I say we have 80 per cent. distribution, I mean our product will be found in approximately eighty out of a hundred of the better stores.

at all a comparison of the volume of sales. The product may be there and not selling, but still be counted in my estimate of 80 per cent. distribution. I mean I do not know that Kellogg makes any advertising allowance. I believe they do not. I know there is none made in the territory under my supervision.

None comes through me. The chances are I would not know what may be done at headquarters on large chains or with large distributors, if there were an advertising allowance or something in lieu thereof, except from the fact that, when our company does anything, they have not done it for any one section alone,

but extended it to the entire country.

Five years ago we put our Whole Wheat Biscuit on as Kellogg's Shredded Whole Wheat Biscuit. To begin with, we put the same intensive sales efforts behind it then that we now use in connection with Whole Wheat Biscuit. Then, for a time, we did not. The package was smaller then, but we found it was the wrong size, discontinued it and put on the present size.

Plaintiff's Exhibit 166 is the nine-ounce package we started out with, which did not go so well. It was discontinued for Plaintiff's Exhibit 165, the twelve-and-a-half-ounce package called Kellogg's Shredded Whole Wheat Biscuit. We put our usual efforts behind the package. I cannot state what distribution we had of them. I was in Des Moines at that time. We had them there. We used the same promotion methods I outlined in my direct examination.

We do not undertake to deal with public and state institutions and the like on a direct bidding basis. I issue no bids for institutions. We sell state institutions through wholesale grocery channels. We have our own men calling on all state institutions, hospitals, and so forth. We do not have anything to do with invitations to bid. We do not get them or have anything

to do with bids. The jobbers themselves bid. We have no direct dealing with institutions anywhere in my territory, but we contact them with our salesmen, the same as we do retail outlets.

The usual procedure in calling on an institution, is to contact the dietitian or chef and get him to use our cereals more extensively and list them on his next requisition, which goes to the jobber, not to us. There is competitive bidding by jobbers for state institutions.

If we had an item in an invitation to bid from Red Wing State Training School, shredded wheat, twelve and a half ounces, ten pounds, I really would not know whether it referred to our product or not. Our package does contain twelve and a half ounces. I believe the shredded wheat package contains or did contain twelve ounces. The inclusion of twelve and a half ounces in the specification from a public institution on shredded wheat would probably be the result of our salesman's call.

Another item from the State Sanitarium, shredded wheat, twenty-four to the case, twelve and a half ounces to the package, I would imagine would probably be specified that way as a result of our salesmanship. For institutions, we have a regular form order book containing a list of all our products, with the weight listings after each listing on that form. Our man usually leaves a copy with the man in the institution, for his order or requisition, whether chef, steward, or who.

I have seen forms like form 57, schedule 8, cereals and breakfast foods. I could not identify it as a form used by the State of Minnesota, except that they are state institutions. Practically every state has them. The State of Iowa has a form for institution buying. I see Anoka State Asylum, Hastings State Asylum, and Willmar State Asylum, and Fergus Falls State ospital. I judge them to be in Minnesota by the names

of the towns. I would judge the six sheets, Plaintiff's Exhibit 228, to be authentic copies of their requisitions. I assume they are. Those do not come to me. I have seen forms in Iowa like these.

RE-DIRECT EXAMINATION.

THE WITNESS: On page 1 of Plaintiff's Exhibit 228. "Shredded wheat biscuit, 2307, shredded wheat biscuit, three cases," I would judge that to be Niagara shredded wheat biscuit. In this reference, the word Shredded is capitalized, and the words wheat biscuit are small lettered.

On page 4, under Red Wing State Training School, I would say the product there, ten pounds twelve-anda-half-ounce shredded wheat would be Kellogg's Whole Wheat Biscuit. The same thing is under Sauk Center Home School for Girls, shredded wheat, twelve and a half ounces. We do not and cannot have that put in. Our men request them to order the product as Kellogg's Whole Wheat Biscuit. There is a distinction in the weight and packing of the two. I could not answer whether, when shredded wheat or shredded wheat biscuit is referred to in these specifications, it means any particular manufacture of that product to the people who put it in the bids.

I do not believe there are any self-service stores in my territory, especially in the Twin-City. I do not know any, if there are. There is no self-service store. like Piggly Wiggly, where they go in and pick goods off the shelf and put them in the baskets, in this territory, that I know of. There might be some in the out-

lying territories.

JOHN OLSON.

Deposition taken at Minneapolis, Minnesota, April 18, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a grocer with a service store. We have from six to eight employees all the time. We are the Olson Bowman Company, a partnership. I am the Olson of the firm. We get telephone orders, make deliveries, and carry charge accounts where they are

justified.

We handle Kellogg's Whole Wheat Biscuit, for which there is a consumer demand. We also handle the original shredded wheat. We sell at least twice as many Kellogg's as shredded wheat. The Kellogg people have trimmed the windows and done display work. I distinguish the other as the old-fashioned shredded wheat, as I have always called it. I have not seen anyone from them to co-operate with me in the last two or three years. No one has been over to help me trim windows, to help at all, or to sell me the product. If I want a case of old-fashioned shredded wheat, I have to go and order it. No salesman comes to sell me at all. We have the two of them on the shelves alongside each other. If a customer comes in, she can get either one she wants. If she wants old-fashioned shredded wheat and asks for it, she can get it. If she wants Kellogg's, she gets what she wants. I know people prefer Kellogg's because it is a smaller biscuit and they get more for their money in that package. I have heard that mentioned. The two sell about the same price. We get a quarter for two. I think the profit on both is about the same, the percentage. We have better co-operation from the Kellogg Company. They trim our windows and sell us their products, fix a window display and give us dummies we can use over Sundays. We see

nothing like that from the National. We do not even see a salesman.

We do not practice substitution in our store. A lady gets just what she wants. We never have any confusion between the two products, do not have a customer send back one and say she wanted the other; because we usually ask them, unless we know what a customer is using. If a lady asked for shredded wheat, we would usually ask her which kind she wants, the old-fashioned shredded wheat, or Kellogg's. They get

whatever they want.

We handle no other National products except shredded wheat, and, from time to time, fruit cakes or something in season, when a man may come around. Except for that, we have only this one we handle. We have had cookies in the past. We have handled the rest of the Kellogg line of products. I do not think the name Kellogg on the Whole Wheat Biscuit package is an advantage in selling the product. I think they just want that particular biscuit, regardless of what name is on it. It sells in my store because it is a smaller biscuit. I do not think we ever have it called for as the small shredded wheat. I would not say that. They ask for Kellogg's and that smaller biscuit over the 'phone, I have been told.

I would surely be willing to give the National Biscuit Company window displays, if they just attended to it. Years ago, they sampled in our neighborhood. I have not even seen that lately. Shredded wheat people do not come around and distribute samples. That would stimulate business, but I have not seen it in two

or three years.

I am not connected with any buying organization or voluntary chain. We have orders for the Buy Rites, with about twenty stores, but that makes no difference as to selling it, because they advertise both brands. Kellogg's may come down there and tell us to advertise more. They may have some deal on. I have never seen any others put an ad in our dodger. The Kellogg Company had ads in there.

CROSS-EXAMINATION.

THE WITNESS: I suppose the Kellogg Company pays for the ads it puts in. I do not know any of the National Biscuit people who come to my store. I do not know Mr. Monroe sitting beside you. I do not believe I have ever seen him in our store. I do buying, and Mr. Bowman does some buying, also. The National Biscuit salesman might contact him; but I have never seen him. I know the National Biscuit Company do not call on Mr. Bowman to sell shredded wheat. come in and sell cookies. I have seen a salesman come in and try to load us up with cookies; but we are lined up with the Sanitary right now. There may have been a National man in to sell us cookies, but there has been no man in to sell us shredded wheat. We do not know that the cracker and cookie man will sell us shredded wheat. If he comes in for an order and does not say anything about shredded wheat, does not want to sell it, that is his business. We do, however, carry shredded wheat. I put it alongside Kellogg's. A lady can come in and take either package off the shelf. We bay it through the jobber.

I buy four or five cases of Kellogg's biscuit a month. If we get rid of two cases of shredded wheat a month, we are lucky. I think my sales in shredded wheat have dropped down since the National cookie people took them over, because we used to sell quite a bit of shredded wheat before that. We have been selling shredded wheat about twenty years. I have

been in business twenty years or more.

Before Kellogg's Whole Wheat Biscuit came on the market, shredded wheat was the only article of that kind we had. I think we have been carrying Kellogg's biscuit about five years, as close as I can recall. In that time, it has come up and supplanted shredded wheat to the extent that we are now selling it two to one.

If, prior to the time Kellogg's biscuit came out, one of my customers asked for shredded wheat, that was the only one kind. I had known it for twenty years; and the public knows it as shredded wheat. When a customer calls on the 'phone and asks for a package of shredded wheat, we will ask her what she wants, because we do not want to substitute. We do · not want any confusion. We want to give her what she wants. When she asks for the shredded wheat, we do not reach for Niagara shredded wheat or for Kellogg's, either; but we may ask her which one she wants. Our store is open. They can go up and take what they want. She cannot do that when she is on the other end of the telephone, and then we ask her. If she says shredded wheat, we distinguish them as old-fashioned shredded wheat, and Kellogg's; and then she can decide which she wants. Then, there is no comeback. We have it right the first time.

JOSEPH E. KROEMER.

Deposition taken at Minneapolis, Minnesota, April 18, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer. I am the proprietor of Kroemer's Grocery. I have been in business about thirteen years. We have a service store, making deliveries and giving charge accounts where they are justified. We have three in the store, including myself.

We handle Kellogg's Whole Wheat Biscuit, for which there is a consumer demand in our store. I have carried it some five years, as I recall. I handle, also, Niagara shredded wheat and have carried it ever since we have been in business. The two sell about equally in quantity. We get the same price for each: thirteen, two for a quarter.

We get co-operation from the Kellogg Company in the sale of that product. Men come around and give us window dressings. From the National Biscuit Company we have not seen a man come for an order or any salesman come in, or window or other displays. Nobody has come around. We get the Niagara product through a jobber, St. Paul Wholesale Grocery. We also order Kellogg's biscuit through the jobber. We do co-operative advertising with the Fairway group. I do not recall our doing any advertising of either shredded wheat or Whole Wheat Biscuit.

We do not have confusion in our store between those two products, never had a customer send one back and say the other one was wanted. We do not practice substitution in our store. The customers usually call them shredded wheat and Kellogg's Whole Wheat Biscuit.

CROSS-EXAMINATION.

THE WITNESS: When they call them shredded wheat, I know right away what they mean. We have no hesitancy. We do not stop and ask them whether they want Kellogg's or the other. I had personal cause, when we were out one time, to remember to be sure and get it. A young lady really demanded it of us. For a time we were out of Kellogg's and she insisted upon it. I asked her why; and she said she preferred the Whole Wheat Biscuit to the other.

We do, however, have calls for shredded wheat. They sell about equally in our store. We have had a National cookie man around. We can get our shredded wheat from him, but we do not buy it that way. We buy it through the jobber, and we also carry National Biscuit cookies, zweibach, and pretzels. We buy those from the National man. I know I can buy shredded wheat and have it figured in my discounts. The National salesman has mentioned shredded wheat. He may have it printed on his cookie order blank, with Uneeda Biscuit. I have not noticed that.

Substitution would mean if a woman called for shredded wheat and I would send her the other, being out of shredded wheat. I would not send her Kellogg's Whole Wheat Biscuit without asking her if she would take it and telling her we were out of the other. That is what I mean. If a woman came in and asked for shredded wheat, I would suggest the Kellogg product to her. I would not want her to get away without my making a sale. I would not regard that as substitution. I do not know whether I would regard that as coming under that head or not.

I have had shredded wheat as long as I have been in business and always known it as shredded wheat. People have known it by that name, and it has always been asked for by that name for many years. As long as I have known it, it has been sold in a package like Plaintiff's Exhibit 1, and it has always been the same sized biscuit, always looked the same.

CHARLES R. STEARNS,

1555 Van Buren Street, St. Paul, Minnesota.

Deposition taken at Minneapolis, Minnesota, April 18, 1933.

DIRECT EXAMINATION.

THE WITNESS: I operate my own cafeteria under the name of Quality Tea Rooms Cafeteria. Our customers wait on themselves entirely. The goods are put on the counter and go on down with the trays down the tracks. The customers pick up what they want. We carry Kellogg's Whole Wheat Biscuit in the individual carton. We display it by putting a carton in a bowl and setting the bowl on the counter. The customer picks up the bowl with the carton in it and opens it himself.

We do not, as a rule, handle Niagara or the old, original shredded wheat. We have had some, but not usually at a time when we had Kellogg's. Before one kind was gone, a few packages of the other might be in. I have not found it made any difference which we carried. The customers take either one. That way of serving and displaying cereals in our type of restaurant is a common, as far as I know, putting the carton in a bowl, and having the customer pick it up and open the carton himself.

I have not seen for a long time any restaurants serve either Kelloggs or the old shredded wheat biscuit out of the big cartons. As a restaurant man I am very glad to serve the cereals in individual cartons. They are easier to take care of. I think the package is more sanitary for our customers. I remember the Niagara shredded wheat is a larger bis uit. That was also in individual cartons.

I am starting my sixth year in the restaurant business. During that time, I have seen shredded wheat displayed in closed glass globes, but not at our place. It seems to me the last place I saw them was at the Pearl Cafe in Red Wing, more than two years ago. I do not think that is a current way of displaying the hiscuit. It was prominent at one time, but I believe it has gone out.

It makes no particular difference to me whether I serve the large biscuit of the Niagara Falls people or the smaller Kellogg's biscuit. We charge the same price. It seems to make no difference to our customers, to have them mention it. It is self-service is our place. They pick up what they want. There is a Kellogg

salesman who calls on us. I have bought assorted cases, but, usually, I buy a case of each item. I handle shredded wheat now a case at a time. There is no National Biscuit salesman who calls on me to sell me shredded wheat. There is a General Foods man. I got my last supply of shredded wheat by ordering it through the Foley Grocery Company in St. Paul. Grape Nuts is our largest-selling breakfast cereal in package goods. They sell about the same as Corn Flakes. First Grape Nuts, then Corn Flakes, then Bran. Most of the restaurants now serve cereals in individual cartons.

CROSS-EXAMINATION.

THE WITNESS: We occasionally order shredded wheat just for a change, just a little different package. Our customers noted the difference one time that I can remember. A lady asked for the Niagara biscuit. She asked for shredded wheat, and we did not have it. We told her we had Kellogg's Whole Wheat, and she took it. She used that instead of the shredded wheat. I do not stock the two at the same fime, because the volume is so small. If I'had two at the same time, I figure my stock would get too old, with two cases. It is not an important item with us on either side. We have call for it. A case of shredded wheat will last us maybe once a month. Sometimes I order one and sometimes the other. If we have Kellogg's Whole Wheat Biscuit in stock at the time and somebody asks for shredded wheat, we give them Kellogg's, telling them that is what we have. I might tell them we have a shredded wheat biscuit I tell them I have Kellogg's Whole Wheat Biscuit or shredded wheat biscuit. I ask them if they want to try that. I do not tell them it is the same thing. We have no waitresses on the counter. Boys take care of everything. If a person did not find what he wanted, there would always be somebody he could ask about it. We seat one hundred and four people in our restaurant. Our cereals are nearly altogether sold at breakfast time. Our breakfast trade is not very large.

RE-DIRECT EXAMINATION.

THE WITNESS: Our customers wait on themselves. I find Post's Bran is more popular than the others. We carry it, and they say they like it better. As far as Kellogg's Whole Wheat Biscuit or shredded wheat are concerned, they just pick the product up and take it along. We do not alternate the two products in any regular period. If a salesman calls oftener upon you, he gets a whole lot more business than the other. I think I will shift brands back and forth again. In other words, in a month or so, I will be using Kellogg's, and again in a month or so, I will be using shredded wheat. I imagine I will change again some time during the summer. I like variety, usually, something that looks different. It is more of an eye appeal than anything else. People notice the difference. It is my idea to have a different package on the counter every little while. By eye appeal, I mean that, after they are used to seeing the Kellogg package for a while, I want them to see the Niagara Falls package there a while. They seem to notice things of that sort. I think they do not like to see the same old package too long. Post's Bran Flakes is the name of the product I spoke of. I imagine it may have on it "with other parts of the wheat." I do not know.

MRS. EDITH M. WILLIAMS.

Deposition taken at Minneapolis, Minnesota, April 18, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am manager of Williams Cafe, conducted by me and my husband. We handle breakfast cereals altogether in the individual cartons. The cereals are in a glass case behind the counter. When a customer orders one, we give them right in the package, and we open it for them. We put a package beside the bowl.

We handle Kellogg's Whole Wheat Biscuit in the individual package. We have carried it ever since we opened, a year in May. We carried the other, shredded wheat, at first. I do not know why we discontinued it. It did not seem to pay to keep two. The demand seemed more for the smaller biscuit. We never had any complaints about it, of people saying it was not what they wanted. The general, regular customers usually ask for Whole Wheat Biscuit. New customers will point it out, as a rule.

The Kellogg salesman calls on us and solicits orders. We have always bought a case of Whole Wheat Biscuit at a time, in the individual cartons. We prefer to handle cereals of that kind in individual cartons. We have not handled them in the big cartons. I do not know any restaurants who serve them out of big cartons, recently. I have understood the common practice is to serve all cereals in individual cartons. I know of no restaurants that do not serve them that way. I get out very little to other restaurants.

I'do not recall that I have had any calls from National salesmen, trying to sell me the old shredded wheat we used to handle. I do recall Kellogg salesmen coming around regularly.

CROSS-EXAMINATION:

THE 'WITNESS: We have sixteen stalls and six booths, and a counter. We sometimes have a large breakfast trade. Luncheon and dinner are more important. They tell us we use the average amount of cereals. We use a quite a few. I probably buy a case of Kellogg's biscuit about once in two months, in individuals; I guess a little more than a hundred packages. I have only ordered shredded wheat once or perhaps twice since we started, about a year ago. Since then, I have not ordered any more shredded wheat, but have used Kellogg's Whole Wheat Biscuit. When people ask for Shredded Wheat now, Kellogg's biscuit is all we have to serve. We are handling it. I could not say for sure if customers ask for shredded wheat. I do wait on them. If they did ask for shredded wheat, naturally, having Kellogg's, I would serve them that.

RE-DIRECT EXAMINATION.

THE WITNESS: No customers recently, that I recall, asked me for shredded wheat. They just point out what they want.

JOSEPH TROST.

Deposition taken at Minneapolis, Minnesota, April 18, 1933.

DIRECT EXAMINATION.

THE WITNESS: I have a retail grocery, service store, under my own name, with two assistants. We have charge accounts where they are justified and make our own deliveries. People can pick up goods in the store and wait on themselves, if they want to.

We handle Kellogg's Whole Wheat Biscuit and have had it since soon after they put it on the local

market. There is a consumer demand for it. Some people call it Whole Wheat Biscuit, and others say Kellogg's shredded wheat biscuit. If they say Kellogg's shredded wheat, we give them Kellogg's Whole Wheat Biscuit.

I also handle the other biscuit, Niagara Falls shredded wheat and have carried it for several years, probably ever since I have been in business. Of the two, we sell more Kellogg's. I think the consumer demand for Whole Wheat Biscuit has been created mostly by Kellogg's. When we first got them in, we displayed them in the store and mentioned them to customers. Since, we have treated it as an ordinary article, the same as anything else; and the demand for it has continued and is increasing.

The salesman from the Kellogg Company comes around to see us sometimes. He is not around very often. We order Kellogg's through the jobber, calling him up, or the jobber salesman calls. I never had either product returned with the statement a customer had ordered the other. I have had no confusion between the two products or gotten them mixed up. I do not recall any customer telling me why they liked one or the other. We sell both at the same price. I think Shredded Wheat is all I handle of the National line.

I belong to the Buy-Rites of St. Paul. I do most of or a good deal of my buying through the Lux Company, a joober who has quite a few things but not a full line like large jobbers. I do not know what discount I get on shredded wheat and I do not know just what the chain stores get out of it.

Cross-Examination.

THE WITNESS: It will soon be thirty-three years I have been in the grocery business, always in St. Paul. I have been familiar with the shredded wheat package the biggest part of that time, ever since I started in for

myself. Probably, I sold it longer than that. It has always been sold in a package something like Plaintiff's Exhibit 1. All the time I have known it, the biscuit has been the same size and had the same appearance, as far as I know. It has always been a well-known product. It has always been known to my consumers as shredded wheat and nothing else and always asked for as shredded wheat. I think they used to be shredded wheat biscuit some years ago; but shredded wheat has been the popular name for it right along, I think. For a long time, I think there was nothing else like it, until the Kellogg biscuit came on the market comparatively recently.

I think I stocked Kellogg's biscuit as soon as it got on this market, maybe four or five years ago. When they first put it out, they sold it as Kellogg's Shredded Whole Wheat Biscuit in a carton like Plaintiff's Exhibit 165, which I recognize. I think they called it that in those days. At that time our sales of it began, and they have been increasing right along. I could not say whether that increase has been at the expense of Shredded Wheat. We sell both of them right along and have them side by side. We do not sell as much of anything as we used to; but we sell quite a lot of shredded wheat,

right along. Both are selling now.

When my customers ask for shredded wheat, the old product, like Plaintiff's Exhibit 1, is what I give them. I carry no other of the National line, none of their crackers. The salesman calls on me and does his best. It is no fault of his. He has not succeeded in selling me any crackers. I did carry the National line quite a few years ago. I buy my shredded wheat from the jobber.

RE-DIRECT EXAMINATION.

THE WITNESS: I stopped handling the National line because there was a little misunderstanding about

discounts. I did not think they were giving me as good discounts as they were giving the others. I have not given it much of a thought now. I am buying from another company and am satisfied. It is a local concern.

I cannot remember any instance where a customer has asked for shredded wheat, and I gave them the Niagara shredded wheat, and they said that they wanted the other. I never had a customer ask for little or small shredded wheat. I have had quite a number of them asking for Kellegg's shredded wheat. When they do, I give them Kellogg's. That is what they want.

MRS. MINNIE WIERS.

Deposition taken as Minneapolis, Minnesota, April * 18, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, with a husband and three children, making five in the household. I am a user of Kellogg's Whole Wheat Biscuit and have used it since they were on the market. They were recommended to me by my grocery man, who said he was carrying it. I gave it a trial. Since then, I thought I liked it better. From then on I continued using them. I have compared them with shredded wheat biscuit and find it is a smaller biscuit. They are really a smaller package, toasted a little better and on both sides, which the others are not.

The children like and are well pleased with the biscuit. One thing they like is it is not at all salted. Some cereals are. I just call them Kellogg's and have no difficulty in getting them. Schoch's carried them ever since they were out. If I have asked for Kellogg's and gotten the other shredded wheat, it was just by mistake in putting up orders, even if I have mentioned

it to them. I would not bother to send the other back, but I would have them make a note to send Kellogg's next time, because we like it so much better than the other. It was just a mistake, because others than those taking the orders put them up. It does not happen often, not more than once or twice since I began using Kellogg's.

I came here today through Billy Sorenson, a clerk at Mr. Schoch's grocery store, at Seventh and Broadway, who knew I used them. Some party called to see me. The Schoch grocery is an old, established grocery.

CROSS-EXAMINATION.

THE WITNESS: I have been there nineteen years now. I have been keeping house practically ever since, all my married life, except the first six months. Before I knew about Kellogg's Whole Wheat Biscuit, I used shredded wheat, which I have known all my life, too. If there is something better in place of it, you will naturally try it. If you like it better, you get it. Up to that time, I had been getting shredded wheat and liked it. Then Billy Sorenson said he recommended Kellogg's, and I tried Kellogg's. Since then, I have used Kellogg's. He recommended it to me in the store where I had gone to give my order for shredded wheat. When I ordered shredded wheat, he suggested I try. Kellogg's Whole Wheat Biscuit. I took it home and have used it ever since instead of shredded wheat. When I call up I ask for Kellogg's shredded wheat, or biscuits, shredded biscuits, or anything, because they know me so well. They know any time they ever sent me another kind, they would get it back.

RE-DIRECT EXAMINATION.

THE WITNESS: I have used Kellogg's Corn Flakes.
Llike those, too. They are very nice.

MRS. MARTHA A. STICKNEY.

Deposition taken at Minneapolis, Minnesota, April 18, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, with a husband and three children, five in the family altogether, and we are commers of Kellogg's Whole Wheat Biscuit. We have used it either three or four years. I first saw it in a grocery store, on the little counter. He told me they had some new shredded wheat in the market. It was introduced to me as a new shredded wheat. I had tried the old shredded wheat before, and I noticed a difference between the two. There is a different shaped package. I did not think it was the old product I was getting. I knew I was not, because the biscuit was entirely different, and I thought it even tasted different. I liked it better than the old product. It was crisper and I thought it was fresher. I have continued to use it. The children like it very well. I have trouble getting it. If I order shredded wheat by telephone, I get Niagara Falls shredded wheat. I have to say I want. Kellogg's shredded wheat or I get the other. That has happened at least five or six times. Each time I said I wanted shredded wheat, I wanted Kellogg's. time, they sent me Niagara shredded wheat, and I returned it. I got them before and asked the reason for it. He was out once or twice. Since then, he has remembered it. I always ask now for Kellogg's shredded wheat.

CROSS-EXAMINATION.

THE WITNESS; My husband is a machinist for the Great Northern. I have been keeping house about twelve years. Before I knew about Kellogg's biscuit, we used the shredded wheat in a package like Plaintiff's Exhibit 1, which I recognize. I have known

that a long time. We used that when I was a little girl. We always had it at my home, and it was a very well-known product, always known as shredded wheat. I am not at all surprised when I see this shredded wheat the grocer sends me in that package. I would really think one might be mistaken for the other. It is just different products. They are both shredded wheat to me; one being National shredded wheat and

one Kellogg's.

Up to the time the grocer called my attention to Kellogg's, I had been using this shredded wheat. Since then, I have been using Kellogg's, always, unless he called me up and happened to be out, but I have already sent this back. Since then, I have always used Kellogg's biscuit. My grocer is Kroemer. When he first called my attention to Kellogg's biscuit, I was in the store but not to buy shredded wheat at that time. As a rule, when he has something new, he usually calls my attention to it. They usually have a display of the shredded wheat. He carries all Kellogg products. He asked me to try it, I think. After that, I tried it, because I heard in the meantime there was a new shredded wheat biscuit out. Since then, I have been using them.

I serve the biscuit at home in a sort of oatmeal dish. My husband prefers it with hot milk first, then with milk and sugar, with bananas or other fruit. The children prefer it with milk or cream. I take it out of the package and put it on the table in dishes.

I came here today through Mr. Steinwerk, who works for the Kellogg Company. I have known him for several years, before he was married and afterwards. He mentioned the controversy to me and asked me if I would tell if I liked Kellogg's shredded wheat. I said I would and thought no more of it. He called me and asked me to come today.

RE-DIRECT EXAMINATION.

THE WITNESS: I have used Kellogg's Corn Flakes regularly.

PAUL G. SCHOCH.

Deposition taken at Minneapolis, Minnesota, April 18, 1933.

DIRECT EXAMINATION.

The Witness: I have a regular wholesale and retail grocery store, the Andrew Schoch Grocery Company, a wholesale house, with a retail establishment connected with it. The wholesale end of the business serves restaurants and hotels mostly in St. Paul and some suburbs, such as White Bear and Bald Eagle. We have two or three salesmen who travel around the city but most of them are telephone men. I could not say offhand how many wholesale accounts we have. Seventy per cent. of our business is charge.

We carry Kellogg's Whole Wheat Biscuit in the wholesale trade. We have carried that product, I think, several years, as long as I can remember. There is a consumer demand for it in our retail establishment.

We handle, also, the original Niagara shredded wheat. I made a little survey of the sales. Last year, we sold, a third more of Kellogg's than we did of the National. That does not include the individuals, of which we just handle Kellogg's. I do not know whether the National have an individual. The Kellogg salesmen call on us in both the retail and wholesale end. We do not get as much service from the National as we do from the Kellogg Company. In fact, they have only one man that I know of, who sells cookies and shredded wheat. I cannot say that we have any confusion in our retail store between Niagara shredded

wheat and Kellogg's biscuit. No instance was ever brought to my attention where either was sent back with the statement the customer had ordered the other. Both brands are pretty well-known on the market now. When they ask for Kellogg's shredded wheat, we know they do not want the other, the regular, and they would get Kellogg's Whole Wheat Biscuit. If they said they wanted the regular Shredded Wheat,

they would get the Niagara.

Kellogg's biscuit was just introduced here a year The consumer demand is more when they see that. Kellogg's are more aggressive, are right in back of all their products, with demonstrations, deals, and things of that sort, store displays and window displays. We had one like that almost every week. They put on deals and created a demand for it. They did sampling. Our store advertises the products, and I think we have advertised Kellogg's Whole Wheat Biscuit. We have advertised almost all the cereals, especially if they have a deal, advertising Bran Flakes in conjunction with cereals and the shredded wheat biscuit. If they are ten-cent packages, it might be three for twenty-seven. That combination includes one package of Kellogg's biscuit. They have used Jungle Land Books and the Wheel of Knowledge.

The package we use is like Defendant's Exhibit I do not think we have ever had any cellophanefront packages of Kellogg's biscuit. We charge a little higher price for the regular Shredded Wheat than for Kellogg's. We pay more money for it. We are just a regular wholesale house, having no connection with any co-operative group or voluntary chain. I do not think Shredded Wheat is as good a seller as it was years ago. There is very little push behind it. The National has not kept it up the way the old Shredded Wheat Company did.

We do not practice substitution in our store. If a person asks for a certain article and gets something else, he is bound to send it back and it is poor policy, anyway. If a party asks for a certain article and we have something far superior, our clerks talk-it and sell it if they can. They stress different points, more quality or quantity, and ask them if they will try the new product. I do not regard that as substitution or improper. We really do not impose on them. In a

way we regard it as a service to the customer.

In case of the substitution I described, the customer would know she had not gotten the product she asked for and would send it back. Under modern conditions I know of no instance of fraudulent or deceptive substitution, where a store tried to substitute a package deceptively like another package so the customer would think she got what she asked for. However, we do have certain articles advertised at certain prices. When the customer asks for it, they will say they are out, but here is another article. is practiced, especially in chain stores. Indirectly, I think there would be an element of fraud there, because you are really calling people there with the idea you have it and then you say you are sold out but have something similar. The grocer himself is the only one who would know, because it is even below cost.

CROSS-EXAMINATION.

THE WITNESS: That is a sort of bait to get a customer in. I do not adopt that practice in connection with Kellogg's Whole Wheat Biscuit. We do not practice substitution. When a customer asks for shredded wheat, we occasionally suggest they try Kellogg's. If we had a superior product, we would endeavor to induce a customer to try it. Some people are more critical; and you can just about judge whether to suggest it or not. If they say no, their mind is made up and they want shredded wheat. I would not say whether we have pushed Kellogg's biscuit that way, because, when Kellogg comes out with a new product, they put on something popularly advertised and make a deal on it, which brings people in. If they try it, they will more or less create a demand for it.

Some of that demand for Whole Wheat Biscuit has absolutely been created among customers who formerly used shredded wheat so there are former shredded wheat customers who are now Kellogg customers. There is no doubt about that. Some people come in and ask for the original shredded wheat. Some say regular shredded wheat, having in mind there is another. You might call it the genuine shredded wheat. Kellogg's biscuit looks like it, but it is somewhat smaller.

A good deal of business is done on bids. At Fort Snelling, they bid on shredded wheat so many cases, specifying twelve and a half ounces. National Biscuit's product is twelve ounces. Twelve and a half cunces naturally means Kellogg's. We absolutely have to fill that with Kellogg's, because the regular shredded wheat will not answer that specification. I think Fort Snelling specifies it that way because it is practically the same product. It is a shredded wheat, only a little more in one package than the other. It is probably because the Kellogg salesman has been busy out there, selling his product to them.

I do not mean that shredded wheat is not advertised at all, but they have not had the free deals, displays, and so forth. I have seen shredded wheat advertised in the newspapers recently, and in magazines. It is the same sort of intensive work the Kellogg Company are now doing that shredded wheat company did originally. I have known it for years, and it was the

only product of its kind. We did not have to call it regular shredded wheat then. People asked for shredded wheat, and we knew what was wanted right away. I have been in the grocery business pretty nearly all my life; and I have known shredded wheat all my life. Up to a few years ago, there was nothing else like it. It was in a class by itself, because nothing else came out like that. It was known as shredded wheat and nothing else.

Then Kellogg's Whole Wheat Biscuit came along, and we have people who sometimes ask for shredded wheat. We do not have it listed in our catalog. In the restaurant business, individual size, we handle only Kellogg's. I do not know whether the National make individuals. We buy the old shredded wheat from the National Biscuit Company and cookies, also. We have regular calls from the salesmen. I can buy shredded wheat as a jobber just now. I think we are a little ahead, because the cookie works on a sliding scale. The more you sell, the more discount. That affects the shredded wheat, too. We buy shredded wheat in five or ten-case lots. Every so often, with a quick turnover, ten cases. It is still a pretty good seller. There is a certain demand for it.

When I say there is no confusion between the two, I mean we have no trouble telling them apart. A customer usually goes over and looks at the cereal first, trying to point out which they want. When they telephone and ask for shredded wheat, we have no doubt what they mean. Our clerks have different customers. We know just what they want, even over the telephone. When people call and ask for shredded wheat, sometimes, a clerk will know they want Kellogg's biscuit and will send it without further questioning.

MRS. ETTA M. SCHULTZ.

Deposition taken at Minneapolis, Minnesota, April 18, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife. We have five in my household, all adults. I am a user of Kellogg's Whole Wheat Biscuit, and I have used it since sometime last fall, when I started using it and have continued. I used the other shredded wheat before then. I prefer Kellogg's. I like the better toasting on both sides, the stronger flavor after it is covered with milk; and I like the size of the biscuit better, and the way it is packed with paper between. I use about six packages a week. It was first called to my attention by a clerk at Schoch's Grocery. I used to use the other, and he said, "Why not try Kellogg's?" I said, "Oh, well, one is just as good as the other"; and he said I had better try Kellogg's, that he thought it a little better, and why not try it and find out. I said, "If you tell me to try it, I will have to, of course." I did. That is how I came to use it.

When I first got Kellogg's, I noticed the difference, as soon as it was put on the table. My daughter spoke about it first, about its being a better-toasted flavor, when you put milk on it. The other is not and is a lighter brown, even on the one side where it is toasted. You have to be very careful putting hot milk or cream on shredded wheat, toasted only on one side, because it gets soggy and doughy. I regard it as a service for the clerk to introduce a product to me that I liked. I have continued to use it. When I ask for any Kellogg product, I always ask for Kellogg's. I use Pep, too.

CROSS-EXAMINATION.

THE WITNESS: I have traded at Schoch's for fifteen years, and it was his clerk who shifted me from I have bought shredded wheat there for fifteen years. We have not used breakfast foods in my home for a long time. My husband had stomach ulcers and had to diet light, and then we started using a lot of breakfast food. One does tire of a few all the time. We have three or four different kinds. I do know shredded wheat. It has been known to me for many years. I do not think I ever heard of anything else on the market like it, until I learned about Kellogg's biscuit like it. Those are the only two shredded wheat biscuit I have ever used. I never heard of any other.

When Schoch's clerk told me about Kellogg's biscuit, I had gone there to get shredded wheat. When I asked him for it, he asked me to try Kellogg's. He is a nice clerk and is always asking me to try things. He got me to try this, and, since then, I have not used

any National shredded wheat.

My husband is working. He is storekeeper at the Northern States, handling gasoline and things for the outside men, like a storeroom.

RE-DIRECT EXAMINATION.

THE WITNESS: I did not resent the clerk asking me to try a new product. He often asks me to. I josh and kid him about it. I do not think I have not tried any product he has asked me to. I do not resent it, because I would not now go back to the other kind.

MRS. LILLIAN S. LE BLANC.

Deposition taken at Minneapolis, Minnesota, April 18, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, with my husband and four children, six in the family, altogether, users.

of Kellogg's Whole Wheat Biscuit. We have used that product since it was on the market. I ordered shredded wheat one day. The grocer was out of it or something and sent me the Kellogg brand. He sent it to me with my order. I knew it was a different product from the shredded wheat I had been getting right along. I liked the looks of it, kept it, and tried it. I never would go back to Shredded Wheat and have not.

One thing we liked about Kellogg's biscuit, especially the children, was the smaller size. Many times the little ones could not eat a large shredded wheat biscuit. Liked them because they were browner and on top and bottom. They seemed to be a little finer shreds to chew. I would not use anything else.

Once in a while grocers have sent me things like that, when they are out of what I called for. I usually send it back, because Plam very particular about a brand I want. In this case I liked the package very much. I had not known about it before that time. This is the first I had heard of Kellogg's biscuit.

CROSS-EXAMINATION.

The Witness: My grocer is E. G. Bergman, Central, Minneapolis. Before he sent me Kellogg's, I had been using shredded wheat off and on ever since I started housekeeping. I have been familiar with it all my life. At home, before I was married, I was familiar with it. It has always been known as shredded wheat to me. I believe it was always called that. It was always known as shredded wheat.

I do not remember whether I ordered on the telephone on this occasion, but I had given him the order for shredded wheat, and he sent me up a package of Kellogg's Whole Wheat Biscuit. Since I tried those, I have bought no more shredded wheat, and I have continued to get Kellogg's, which I like so much better.

I always specify Kellogg's shredded wheat. My husband, who is traffic manager for a linseed oil manufacturing concern, likes it, too. We serve Kellogg's biscuit different ways; with hot milk on winter mornings; with milk or cream and fruit in warm weather. We take it out of the package and bring it on the table in a dish. I came here today because Mr. Simonson came to my house. He evidently found from my grocer we always prefer Kellogg's.

RE-DIRECT EXAMINATION.

THE WITNESS: I had not met Mr. Simonson before.

RE-CROSS-EXAMINATION.

THE WITNESS: The gentleman who came to see me was a representative of the Kellogg Company and said he understood I liked the product. I said I would be glad to testify, because I am interested in having it kept on the market.

MRS. JOSEPHINE TOUSIGNENT.

Deposition taken at Minneapolise Minnesota, April 18, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, with a husband and one child, three in my household. I use Kellogg's Whole Wheat Biscuit and have for about eight months. I went to the store and wanted a change of breakfast foods. I looked on the shelf, saw Kellogg's Whole Wheat, thought I would try a package, and have used it ever since. I like it because of being browned on both sides, finer shreds, more weight and fifteen biscuit to the package, and it is cheaper. My child likes it fine. I use all Kellogg's cereals, but my child likes Whole Wheat Biscuit best. She eats it more readily than the others.

I have used the other or original Shredded Wheat. I like Kellogg's better. I order Kellogg's Whole Wheat Biscuit and have no trouble getting it.

CROSS-EXAMINATION. .

The Witness: I got a package of each biscuit and thought out the points of difference I just told you. We ate them and found the difference. The taste was different. I have bought the two packages at different times; but, since Kellogg's biscuit was out, I prefer that brand. By examining the biscuit, I found out those points. As I said, it is cheaper also. I had the two packages to compare at that time. My husband went over them with me and worked out those points of difference. It was never suggested to me by the grocer or the Kellogg Company or anyone, or by any literature of the Kellogg Company.

I just got shredded wheat a couple of times and then we changed to other cereals. I saw this other biscuit, went to it, and have been using it ever since. We never went back to shredded wheat, although I had known it a long time before I was introduced to this other biscuit. We used it a few times. Before I was married I was not home very much. I could not say I had it very many times; but I have had it sometimes and have known about it for a good while.

RE-DIRECT EXAMINATION.

THE WITNESS: I did not know anybody connected with the Kellogg Company when I was asked to appear here. Somebody sent by my grocer asked me. I happened to be at the store when the Kellogg man was there. My grocer, Mayes Brothers, knew I was a user of Kellogg's Whole Wheat Biscuit.

1946 Depositions of C. A. Ruckman-A. L. Case

CLARENCE A. RUCKMAN (Recalled).

Deposition taken at Minneapolis, Minnesota, April 18, 1933.

RE-DIRECT EXAMINATION.

The Witness: The Kellogg Company does not consider an advertising program complete without a complete cycle of advertising tie-ups, like promotional programs in connection with store sale and consumer promotional efforts. We do not think it is effective without the other things tied up with it. We do not think newspaper advertising alone will sell a product, to create a demand for anything.

RE-CROSS-EXAMINATION.

THE WITNESS: I remember a newspaper advertising campaign of Kellogg about a year ago on All-Bran. I did not see Plaintiff's Exhibit 229, in the Minneapolis Journal of April 30, 1932. I did not know there was a series of articles like that around here. That is really the first time I ever saw an article of that nature. I had been in Minneapolis about four weeks at that time.

Mr. CLARKE: I do not question the proof of the clipping. I will not question the authenticity. Ads like that were run, and I assume that is one of them.

A. LEONARD CASE.

Deposition taken at Omaha, Nebraska, April 19, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am buyer at the Nebraska-Iowa Wholesale Grocery Company and one of its board of directors. That is an old-line wholesale house, in busi-

ness under that name about fifteen years. We have a few traveling men. We have a man in Iowa and had one in Nebraska up to a few days ago. Most of our business is done by mail; and we have three men in Omaha, working in the street. We sell the O. P. Skaggs System as a customer. They are not affiliated

with us in any way; just another customer.

We carry Kellogg's Whole Wheat Biscuit and have had it ever since Kellogg had a biscuit. We also carry the rest of the Kellogg line. We carry Niagara shredded wheat. We have not yet found any confusion between the two products in our organization. I do not recall either one being sent back with the statement the other one was ordered. We know the difference in the package, Kellogg being twenty-fours, and National thirty-sixes. If they do not designate which they want, the only way we can find out is to ask them. If we had an order for just shredded wheat, we would have to find out whether it was twenty-fours or thirty-sixes, to protect ourselves. We would be taking a fifty-fifty chance of sending the wrong one and then have to pay the freight back on it. I believe it would be just as much chance that they would want either. I do not recall any confusion. I believe we would be safe in saying we have had none.

I would say National shredded wheat outsells Kellogg's possibly sixty to forty, just a little more. We service the restaurant trade and handle Kellogg's biscuit in individual cartons. I do not believe we sell any Niagara shredded wheat in individual cartons,

just the Kellogg's.

CROSS-EXAMINATION.

THE WITNESS: I never heard shredded wheat referred to as Niagara shredded wheat before Mr. Clarke used that term. I have carried it a good many years

in a package like Plaintiff's Exhibit 1, which I recognize. It is safe to say I have known that as long as I have been in the grocery business, around five and a half years. I have known it longer than that. I was not connected with the grocery business before.

Until Kellogg produced Whole Wheat Biscuit, there was no occasion to add any designation to the term shredded wheat. There was only the one, with no possible chance for confusion, prior t that. That was a very well-known article of trade, and it was always known as shredded wheat biscuit. When a customer called up and asked for shredded wheat, I knew right away what she wanted. When Kellogg put their item on the market, there were naturally two biscuits. If they did not designate which one they wanted, we would have to ask them.

Since Kellogg's biscuit has been available, if a customer orders five cases of shredded wheat, I am not sure what he means. We ask them. If it is a mail order, of which we do a fairly good-sized business, we have to write them, to protect ourselves. We may or may not send the right one. If not, we have to pay the freight back. We have to be sure of ourselves, to save the freight expense. We carry it in our catalogue as Kellogg's. Whole Wheat Biscuit, twenty-fours, and shredded wheat, thirty-sixes, I think. I would have to look at the page to be sure. Even with our catalogue carrying it as Whole Wheat Biscuit, we have occasions when customers order shredded wheat and want us to send the Kellogg product. I would say the growth of sales of Kellogg's biscuit has been quite rapid. We have carried it ever since it has been out, about three or four years, I guess, in which time Kellogg's biscuit has grown until it now occupies, I would estimate, forty per cent. of the field. I do not absolutely know how that has been accomplished; but I would say through Kellogg advertising. We put out a bulletin and a catalogue. We list both these items in the catalogue. It is in a binder, and we issue mimeographed bulletins to fit the binder, which is something like one of your bound volumes of testimony here. We send the bulletins every week, to keep it up to date. We have special bulletins sometimes. We do not push any one item more than another, merely advising our trade what we have, and letting them order what they want. We purchase our shredded wheat direct from the National Biscuit Company in Omaha.

RE-DIRECT EXAMINATION.

The Witness: The National sell shredded wheat direct. A good many retailers do not know that and naturally buy it from the jobber. I knew what you referred to when you said Niagara shredded wheat. I do not recall having heard it called by any other name in the trade, such as National or original shredded wheat. They usually signify it by either thirty-six or twenty-four. We kind of take that as a standard, to keep them separated. The retailers are familiar with those different terms; and I might say they are both called shredded wheat, so that retailers who deal with us would say thirty-six shredded wheat, and: twenty-four shredded wheat; meaning the National and Kellogg's. Sometimes they specify Kellogg's; sometimes not.

RE-CROSS-EXAMINATION.

THE WITNESS: Shredded wheat can be purchased in packages of twelve; but I do not buy them that way. I also know I can buy it in individuals, but I am sure we do not have them.

RE-DIRECT EXAMINATION.

THE WITNESS: I have seen individuals of shredded wheat like the one you show me. Looking at Plaintiff's

Exhibit 21, which you say is a longer shredded wheat biscuit, I have seen the individual shredded wheat package; but I would not know, offhand, whether it was a large or small one.

Mr. Clarke: It is stipulated that Defendant's Exhibit 103, the small carton first shown the witness, was purchased this morning in the dining car of the Northwestern Railroad train, running between Minneapolis, Minnesota, and Omaha, Nebraska, in the presence of Mr. Vilas and Mr. Clarke.

CHARLES L. THOMPSON.

Deposition taken at Omaha, Nebraska, April 19, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am city freight agent for the Rock Island Railroad Company. I know Mr. Sawyer, the branch manager of the Kellogg Company here, who asked me to testify in the case as a consumer witness.

I have been a user of Kellogg's Whole Wheat Biscuit since there was a sample left at the door, which we tried, and I have been using it almost entirely. There are three in my family, all consumers of Kellogg's biscuit when they eat shredded wheat. We have used the other shredded wheat off and on for a number of years. I have used Kellogg's since the sample was left and like it better. We prefer it because of the smaller size of biscuit. The boy cleans it up better than the other. That is really the reason we swung over to it. I like it better personally.

CBOSS-EXAMINATION.

THE WITNES: I remember shredded wheat back quite a while. We used to have it even while I was still

at home. I recognize the package, Plaintiff's Exhibit. I, and always knew it as shredded wheat. There was no other name for it. Shredded wheat is the only name I ever knew for that. I have been married going on fourteen years. I am in pretty close touch with buying in the household. Up to the time I first saw this sample package, I had been using shredded wheat, off and on, regularly. After trying Kellogg's Whole Wheat Biscuit, we swung to Kellogg's and bought no more shredded wheat since. We always buy it at the same place.

My grocer is Sam Brick. I imagine he carries both lines. He is fully stocked and has practically all standard brands of stuff you want. When I purchase Kellogg's, I ask for Kellogg's Whole Wheat Biscuit, the same as the sample read. He has them marked on the grocery ticket that way. The sample at the door was a small box; but we buy the large package with, I think, fifteen biscuit. I do not recall a window in the package. It just looks like the reverse side of Plaintiff's Exhibit 161, with a picture of the dish with biscuit in it.

RE-DIRECT EXAMINATION.

THE WITNESS: The sample we got was like Defendant's Exhibit 76, as to size and general appearance, that small package.

JAMES H. DUBOIS.

Deposition taken at Omaha, Nebraska, April 19, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am caterer and manager at the Paxton Hotel, Omaha, having charge of the restaurant and all the eating places, three of them. We carry in

stock Whole Wheat Biscuit in the individual carton, like Defendant's Exhibit 76. We also handle regular shredded wheat in the individual cartons. We carry it in small-sized cartons like Defendant's Exhibit 103. We have also handled Niagara shredded wheat in the larger-sized individual carton, like Plaintiff's Exhibit 21. At the present time, we, just carry it in the small-sized carton, like Defendant's Exhibit 76. We do not make a practice of displaying. We keep the cartons in the stock room and serve them on order. If they do not specify what is wanted, we give them whatever the servant cares to give them. If they specify, we naturally give them what they demand. If a customer asks for Kellegg's, we give them Kellogg's. If they ask for Niagara shredded wheat, we give them Niagara. If they ask for Whole Wheat, we give them Kellogg's. If they ask for just shredded wheat, that is up to the discretion of the servant. It is served in the carton, which is displayed to the customer and opened up in his presence. We have never had any complaint about either product; nor have we ever had a case of either being sent back, that I know of.

CROSS-EXAMINATION.

THE WITNESS: We do not specify names of firms on any menu cards, nor names of cereals. We just say cereals in general. I changed it just a few weeks ago to say "All cereals." I can send and get one of our current breakfast menus. I only know one thing: that I have handled both kinds of merchandise. Whatever the public asks for they get. Aside from that, I know nothing. I think Kellogg's is a pretty good product and shredded wheat. We never get any complaints.

I have been handling Kellogg's biscuit two or three years; but shredded wheat, Oh, Lord, I have seen the first package that was brought out of Niagara Falls,

many years ago. I have been through the Niagara Falls plant. It, is a wonderful plant. I have seen shredded wheat made. I have seen it in a package like Plaintiff's Exhibit 1. I was in the building about 1914. It was plenty old at that time and was always known as shredded wheat. Until I saw this Kellogg package, I never had anything else like it, that I recollect. I do not recall selling any other shredded wheat during those years.

I now have a menu card here, Kellogg's Corn-Flakes, or Post Toasties, shredded wheat. It is specified merely as shredded wheat. This is the coffee-shop menu, in general use, not dated. Those are under the heading Cereals with cream. Kellogg's Whole Wheat Biscuit is not printed on there. When our customers order shredded wheat from this menu, it is up to our waitress whether she gives them one brand or the other. It is carried on that menu, Plaintiff's Exhibit 230,

merely as shredded wheat.

Plaintiff's Exhibit 231 is the main dining room menu, regular breakfast menu in current use, with Kellogg's Bran, Post's Bran Flakes, Post Toasties, Shredded Wheat, and other items. My testimony about that is the same as I gave about the coffee-shop menu. When a customer calls for shredded wheat, he gets one

or the other, as it happens to be.

The card, Plaintiff's Exhibit 232, is our roomservice menu, used for service in rooms only, and likewise carries shredded wheat, among other items. The same is true about that as I have just testified. I regard the situation as now disclosing two items that may be used for shredded wheat, either one of which will fill the order. I recognize shredded wheat and have known it many a day, as carried on the carton. Whole Wheat is the name of the other product. No complaint of either product has ever come to my attention.

RE-DIRECT EXAMINATION.

THE WITNESS: If a customer were served one product and said he would like to have the other, there would be nothing to do but serve him with the other one, which we would do.

RE-CROSS-EXAMINATION.

THE WITNESS: I have no comparative figures of quantities of either product used. I will be glad to look it up.

RE-DIRECT EXAMINATION.

THE WITNESS: I buy the individual cartons in case lots. The Kellogg salesman calls and solicits my business. The small individual cartons of shredded wheat are ordered through jobbers. We get the service of salesmen through Kellogg and order National through jobbers. I have not yet had anybody from National call on me.

B. FAY HOSMAN.

Deposition taken at Omaha, Nebraska, April 19, 1933.

DIRECT EXAMINATION.

The Witness: I operate the W. O. W. Cafeteria, the Chamber of Commerce Dining Room, and the Keene Coffee Shop restaurant. We handle Kellogg's Whole Wheat Biscuit in all three places, in individual cartons, like Defendant's Exhibit 76. We also handle Niagara shredded wheat at Chamber of Commerce Dining Room and W. O. W. Cafeteria. I do not buy personally for the Keene Coffee Shop, but they did have it there. I have always used the large shredded wheat individual carton, like Plaintiff's Exhibit 21. I do not recall a smaller one. I have seen it. I have a case in

the Chamber of Commerce Dining Room not opened yet, so I do not know which size it is. I could not say whether I would be charged the same price for the

small package.

At the cafeteria, where I have best knowledge of them, either kind, they are put out on the counter. The customer just picks up a bowl with the dry cereal carton in it and carries it forward on the tray. At the coffee urns, the girl opens it up and leaves the material in the carton for the customer to empty. When I have both on hand, either is equally well displayed. We have had as much selling service on one as on the other. The Kellogg people are in the building and look after me a little better. I do not think the National makes a lot from me. It is a little side line. The Kellogg Company, being in the building, naturally watch my cereal business pretty close. I try to keep all my cereals up, including Shredded Wheat. I run out of it more than I do Kellogg's Corn Flakes or Whole Wheat Biscuit, because there is no one to jog my memory to look it up. Both products are equally displayed on the counter, and the choice is up to the customer. To my knowledge, I never had a request for either one separately. There have been times when I have been out of shredded wheat and also times when I have been out of Kellogg's biscuit. I do not remember having anyone saying he wanted the other kind. I prefer the small size to serve, because I think the customer, although he might think he prefers the large size, when he gets through with two large-sized shredded wheat, has had a big meal, too much of one item. The small size is like any other cereal, about right. A man does not care to make a meal of oatmeal, or cream of wheat, or shredded wheat, but on balanced foods.

I do not like a customer to go out feeling overextended. There is, also, a selfish reason, that two large biscuit will take a little more cream. On both grounds, I would rather serve Kellogg's small size than National large size. I order the individual-sized packages by the case. I handle other Kellogg cereals, also. I would not say that the sale of either product compares with a cereal like Corn Flakes, as to volume, which is a much larger seller.

CROSS-EXAMINATION.

The Witness: I have never had anyone, to my knowledge, request shredded wheat. At the Chamber of Commerce, the kitchen opens the package and the chef sends it in in a dish. At the cafeteria, I have never had anybody ask for one in preference to the other. They do take one or the other, and some customers will take shredded wheat and some Kellogg's. We sell both. That is the way we have to do. We do not charge for cream, so we really profit a little better if they take the Kellogg small biscuit. The distribution of shredded wheat has been very poor of late, because no one made any great effort to sell me the National biscuit. I think they put in a carton a couple of months ago, and I looked around for a case two weeks ago.

We have both products displayed in our cafeteria, and they both sell. I think there is no question that Kellogg's sells the most. If equally displayed, I have no opinion whether shredded wheat would outsell Kellogg's or not. We display both there. I so often run out of one or the other, you really have no comparable or equal basis. At times I am out of Kellogg's and at times out of Niagara shredded wheat; then there will be only one on the counter. I have no way of knowing which one is most in demand. We never have it occur that a customer comes in, looks around, and asks for it. They just take what is there. As far as

I know, nobody has come in and asked for shredded wheat, as long as I have had Kellogg's. I was more than three years at the Hamilton and handled Kellogg's exclusively when I was up there. I have been in the restaurant business eight or nine years. Before Kellogg's biscuit was out, I used shredded wheat only. I have known shredded wheat a long time, under that name. I had nothing else like it when Kellogg's came The Chamber of Commerce restaurant is not a cafeteria. We have menu cards there. As it is just a luncheon place, we have no breakfast menu card and we do not list cereals. It is just some case where some elderly man feels he wants a dish of breakfast food. I imagine we sell as much Corn Flakes there as we do shredded wheat. If someone asks in that restaurant for shredded wheat and we are out, he would probably get Kellogg's Biscuit; but we now have shredded wheat there. We never had any complaint there of people getting one and wanting the other. If a customer asks for shredded wheat and gets Kellogg's, he does not say anything more about it.

W. O. W. is a cafeteria, and Keene Coffee Shop is a straight restaurant proposition. I do not buy for it. I have seen shredded wheat there in the past. I do not imagine he makes a practice of carrying both. I think it is listed as dry cereals, but I do not remember. We had only one change in menus since he

started, over two years ago.

I imagine she would serve the original shredded wheat there in a dish, carrying it to the cream dispensary and opening it there; but she would serve either one she happened to have, on an order for shredded wheat.

RE-DIRECT EXAMINATION.

THE WITNESS: I get right now and have in the past received better selling service from the Kellogg Com-

pany than from shredded wheat. I think that is why I have more often been out of the National product than the Kellogg product; although we think these dry cereals have a fair keeping quality and do not worry about having too many on hand. The more you have on display, the more you sell. We carry Kellogg's Corn Flakes and Post Toasties, because we feel some will want one and some the other. When we run out, we have no difficulty in replenishing the supply, just call up and get it. We have girls there, and I am not snooping in the cereal cabinet every day. I have to have somebody jog my memory.

If we run out of Corn Flakes or Post Toasties, we have no friction with the customers because we do not have one. Sometimes a man will like one better. In the way of cereals, we had no one complain. The corn flake proposition is different, because both Kellogg's and General Foods are located right in the building and both take good care of me. If we do not get a complaint, we do not feel a customer is suppressing indignation. For each ten customers who will not complain, one will. Out of a great number, you are bound to get one complaint; but we never had any complaint on these two products to my knowledge. I have not had anyone ask for the other.

MR. CLARKE: I offer Defendant's Exhibit 104 as an addendum to the testimony of Mr. Twentyman, it being stipulated that, if Mr. Twentyman were recalled, he would testify to the facts stated in this letter.

MR. YILAS: All right.

RAY W. SAWYER.

Deposition taken at Omaha, Nebraska, April 19, 1933.

DIRECT EXAMINATION.

The Witness: I am district sales manager of the Omaha branch of the Kellogg Company, with whom I have been connected for nine years. I worked in the retail trade from Cedar Rapids, Iowa, for five years; and I have been in charge of the Omaha district for four years, embracing the State of Nebraska, twenty-three counties in Western Iowa, and the Black Hills area in South Dakota. I have ten salesmen and two office workers. Those salesmen cover the territory I have just outlined. They sell the complete Kellogg line: Corn Flakes, Pep, Whole Wheat Biscuit, Krumbles, Rice Krispies, Bran Flakes, Whole Wheat Flakes, Kaffee Hag Coffee, and All-Bran.

We have secured one hundred per cent. distribution of Whole Wheat Biscuit in the better grade stores, and 70 per cent. of approximately all the stores in my territory; and I would say 75 per cent. in all the restaurants, 100 per cent. in the better grade restaurants.

There is a consumer demand in my territory for Kellogg's Whole Wheat Biscuit, which has been created by sampling, house-to-house selling, coupon postal cards, newspaper advertising, and our salesmen continually calling on the trade, day after day. We have had a lot of dealer co-operation, in creating consumer demand, such as window displays, store displays, and newspaper advertising. I regard house-to-house sampling, the way we have been working it, as the most effective way of creating interest and consumer demand for a new product. Those methods have been effective on Kellogg's Whole Wheat Biscuit, and a substantial business in it has been built up.

The product is serviced to the restaurant and hotel trade through jobbers, also our salesmen, who buy through jobbers and sell to the restaurant trade. It is serviced to the hotel and restaurant trade in a small case, sixty individual packages to the case. Very few restaurants get it in the large package any longer. Maybe a few hamburger stands in Omaha still buy a big package now and then, because they have not been solicited by jobber or Kellogg salesmen. They usually buy those through neighborhood grocery stores, for the smaller-sized restaurants. You see a large package occasionally in a better type of restaurant, which he has gotten while awaiting delivery of individuals. The smaller-sized carton is growing in popularity in the restaurant trade. There was a time when individuals of dry cereals were on the down grade, I think; but they are coming back better now.

I think the individual gives the restaurant man a package he can serve handily. From the manufacturer's standpoint, it advertises the product to the consumer, because the individual packages may be displayed on the counter but would not be in the old big package. In some of our cereals, the sample is larger than the individual package, as on Corn Flakes. In other instances, they are the same, except one is

marked sample and the other individual.

We furnish advertising display material to the stores, which our men believe are responsible for a lot of trade; posters, jumbo cartons, cut-out material, advertising pieces of various kinds. Large window displays are furnished to dealers. We have Saturday store sales, demonstrations, where we have talked about our products and explained where they are different than, perhaps, some other products. In those store sales or demonstrations we have combinations of packages with all our salesmen, every Saturday.

We have done that on Whole Wheat Biscuit from the time we have been pushing the sale. We do it either by giving one Whole Wheat Biscuit package free with the purchase of one, or we have Whole Wheat Biscuit in combination, the customer buying it and getting another product free. Usually, we give the Whole Wheat Biscuit free. Those coupons are sent to lists furnished by our retail trade; and they entitle the customer to one free package, if he buys one package of Whole Wheat Biscuit.

We have used the little Jungle Land Books, the Story Book of Games, and the Wheel of Knowledge. Those are premiums with two packages, usually. We have not had so many of the cellophane-front packages, only about the last three or four months. The bulk of this business has been built up without the use of the cellophane-front packages. It seems that the premiums are valuable in attracting notice to the Whole Wheat Biscuit. It always gets a volume of business when we put on a proposition of that kind in any city.

There is no advertising allowance whatsoever made by the Kellogg Company for dealer advertising. When the dealer advertises Kellogg's biscuit, they connect up activities in their store, such as newspaper or circular advertising. In Grand Island, Nebraska, last week, we put a coupon to every house in town, entitling the recipient to a package of Whole Wheat Biscuit free. We got several mentions in grocery ads, stating, if they brought in the coupon, they could get a package of Kellogg's Whole Wheat Biscuit free with the purchase of one package.

A genuine consumer demand for Kellogg's Whole Wheat Biscuit has been created in our district. I have had reports of instances of confusion with Niagara shredded wheat, dealers sending back our product and

I do not recall just where. One report I had, probably three or four years ago, when the biscuit first came out, a salesman would sell a case of Kellogg's biscuit. It would go to the warehouse and they would ship out Niagara shredded wheat in place of it. The jobber would take the loss, because the price of our product is less than the cost of Niagara shredded wheat. I recall no case of that kind where it was sent back to the jobber. I cannot recall any recent reports of that nature.

Our salesmen sell the product as Whole Wheat Biscuit now. At first it was called Shredded Whole Wheat Biscuit. We get many dealer ads, advertising it as Kellogg's Whole Wheat Biscuit. Occasionally, a dealer will, as they will on any product, call it Kellogg's post toasties, or shredded wheat, or something like that.

I know of no case where they asked for Niagara shredded wheat and got Kellogg's, but I have heard lately of just the opposite, especially in restaurants.

I do not believe the sales of Niagara shredded wheat have been pushed in this territory as hard or in the same way as the sales of Kellogg's biscuit since the National took over shredded wheat. I believe Kellogg has put more effort, because, since National changed its salesmen and gave them cookies and crackers to sell, also; I feel that, at times, their salesmen overlook asking for an order for shredded wheat. I have not found National distributing packages of shredded wheat to the trade. They did sampling, the same as we have done, to the trade here in Omaha, but not in any way comparable to our sampling. I have not encountered their displays in stores, except an occasional large display piece, especially in a window or on a ledge.

I do not find competition in the sale of our Whole Wheat Biscuit to compare with the competition on our Corn Flakes. We get a good deal harder competition on Corn Flakes. Defendant's Exhibit 105 is a case used for packing Niagara shredded wheat, marked on one end: "The original trade-mark Shredded Wheat, Registered U. S. Pat. Off." and, on the other end: "Thirty-six cartons, twelve biscuit each, the original Shredded Whole Wheat. Shredded Wheat bakeries, Niagara Falls, New York; Oakland, California, National Biscuit Company, Uneeda Bakeries." marked on both sides: "Shredded Whole Wheat, Shredded Wheat, Niagara Falls, New York, Oakland, National Biscuit Company, Uneeda California. Bakeries."

Kellogg's biscuit has been introduced into all chain stores in this territory except the Atlantic & Pacific, who have eight stores here. They are just starting to open them up here. The other chain stores have them in stock. The policy of chain stores is that it usually takes pretty good proof that there is a consumer demand before they take a new product in. They usually demand that; because they are usually pretty well stocked up, and they have no way to bring a message to the customer

All our chain stores are run on the self-service basis: Safeway, Piggly-Wiggly, Hinky-Dinky and O. F. Skaggs. Kellogg's Whole Wheat Biscuit are in those stores. I do not know exactly, but I feel safe in saying we sell as many if not more than they do of Niagara

shredded wheat.

I am familiar with the restaurant and hotel trade. I have encountered in this territory some small-sized individual Niagara shredded wheat, like Defendant's Exhibit 103. They appeared here about six months ago. Before that they were all in the large individual package, like Plaintiff's Exhibit 21. There has been just a case here and there of the smaller package, whatever the restaurant orders. I presume they will use that always, now, for their restaurant trade in this area. I know you still see both in the restaurants.

At Saturday sales of Kellogg's biscuit, our salesman picks out a good cash-and-carry or cash service store, where a lot of people come in. He makes an arrangement with the man, or, if a chain store, with headquarters, for a Saturday demonstration. We spread out a display of all our products, show them to our customers, what they are, from Corn Flakes, clear on through. We work up a purchase deal to the customers: three packages of our products at regular price and giving them as a sample a full-sized package of our Whole Wheat Biscuit, being careful to explain to them the way our biscuit is put together. We know that has created a lot of consumer demand, because we go back and check up.

The points of distinction we have emphasized are that our biscuit is smaller ir size, and fifteen biscuit to the package, a half ounce more weight in the package, and toasted on both sides. We have had a great

many compliments on the small-sized biscuit.

I believe our biscuit is selling one or two cents higher than Niagara shredded wheat. Occasionally specials are run on both. We have had many people say, if it has Kellogg's name on it, it must be good.

We regard it as an advantage.

In recent years the customers are a little more picky and choosy than they used to be. The customers are doing more shopping than ever before. Housewives who go out and shop for groceries call on more stores than ever before. In the old days they would call up John Smith and say, "Send me out" so and so. That was all there was to it. In the new stores there has been a great deal more proprietary interest than was ever thought necessary before.

In the self-service stores in this territory the customer comes in, picks up a market basket, goes through a stile on the right. Some do not have a stile, but all have market baskets. They go around and shop. A clerk or girl is asked sometimes, but they usually call it by name. No sales effort is applied to the customer in a cash-and-carry store to sell any particular thing. They take what they want off the shelf, go to the cash register, pay for the goods, which are put in a sack,

and they go on their way.

Kellogg's biscuit was probably on the market seven or eight years before the National put out their small-sized individual biscuit. Assuming Kellogg's biscuit was put out first in the fall of 1927, we saw this small National product, like Defendant's Exhibit 103, for the first time, about six months ago. Until that time Kellogg was putting out a small biscuit and the National a larger biscuit. Since, the National has been putting out the larger biscuit in big cartons, and, in this territory, is introducing a smaller biscuit in individual cartons, apparently. I have never encountered the smaller biscuit of National in any other than individual cartons, never in any of the big cartons. Our large cartons are packed twenty-four to the case. We have sixty to the case of the individual cartons. We have an assorted case of individuals for the restaurant trade, containing corn flakes, Pep, Rice Flakes, Whole Wheat, and All-Bran, a total of a hundred and seven individuals in the assorted case.

I do not recall seeing any assortment of National Biscuit individual cartons to a case. Their large cartons are packed thirty-six to the case. There are twelves, and I believe there was a time when they had twenty-fours.

We have institution bidding in this territory. I attend to that. The invitations are mailed to me. I

fill them in and mail them to the quartermaster or purchasing agent. When I get a bid: "A wheat product, must be shredded, similar to shredded wheat," I am very particular to write in: "Kellogg's Whole Wheat Biscuit, packed twenty-four twelve-and-a-half-ounce cartons to the case," and they have always bought it. I have never had any confusion in bidding, never had any deliveries rejected as not being what the bids called for. I do not know how the other product, shredded wheat, is described when they bid. I have never seen one of their bids.

When witnesses in this case have referred to the National salesman as a cracker or cookie man, I suppose they usually mean the cookie salesman, a man carrying a line of cookies and crackers for sale. I would not say that that line is closely akin to the cereal line in any way. I would not say a cracker or cookie man is a regular cereal salesman. I think the picture has been changed somewhat since things have been consolidated. I do not think the cookie or cracker men work as hard on shredded wheat as the regular cereal man would. Their big volume of business is in cookies and crackers, and they are apparently more interested in selling them. I feel it is just as if I would sell pickles along with my cereals. I would not know as much about pickles as I do about cereals that I have been selling for years and years. These men have sold cookies and crackers for years.

I recall the situation of the Shredded Wheat Company before National took it over. They had wagons and trucks, made house-to-house canvasses, put on store sales, a package free with one or two. They did an exceptional job of promotional work. That was real competition. When National took over, they disbanded those trucks and wagons and everything, as far as I know. They did not take over the shredded wheat salesmen they had at that time, with a few exceptions,

where they found employment for the shredded wheat men. They disbanded that organization for the most part, the selling organization, and turned that part of the business over to the cookie men. They made a change in the old shredded wheat method of distributing their product through jobbers; and they are now selling direct, with their cookies and crackers. They also have shredded wheat in jobbers' stock, the jobber being permitted, I believe, to sell it at whatever price he wants to. I have heard the grocer does not exactly know, sometimes, what he is paying for shredded wheat.

The Kellogg product is not sold direct to the retail trade, but just through jobbers. We get jobber and wholesale co-operation in the sale of Kellogg biscuit, through their salesmen traveling the territory, because the National deliver a lot of Shredded Wheat direct; and the jobber knows he gets no profit on that. So the entire Kellogg business is done through jobbers and wholesalers; and only part of the National business on Shredded Wheat is done through jobbers. I would say those direct sales put the National in competition with their own wholesalers and jobbers. The retail trade would be solicited by both the National and the jobbers,

CROSS-EXAMINATION.

THE WITNESS: I am thirty-six, and I have been with Kellogg nine years. I was not in the cereal or food business before. I was a banker. I had not previously been connected with any food company. I have never been in the cookie game.

Crackers, cookies, Shredded Wheat and summer cereals are all sold in grocery stores. There is no objection whatever to a cracker salesman carrying cereals, if he has them for sale. The old Shredded Wheat Company used some of the methods of sales

promotion I have described as being used by Kellogg, in their house-to-house work and store sales. They were very extensive advertisers in those old days. Shredded wheat, when it first came out, was a novel product. There had been nothing else that I recall produced just like it. It was necessary for the Shredded Wheat Company to do a lot of pioneer work, not only to introduce it, but to teach people to like and use it. That is true on every new product, that is a novelty. Shredded wheat was a novelty, and people had to be taught to like it and ask for it.

I will concede that over the period of years shredded wheat was being promoted, a lot of pioneer work was done, and people had become accustomed to using shredded wheat. When the Kellogg Company came into the field with their biscuit, at least, they were not confronted with introducing a novelty. I have no doubt our Whole Wheat Biscuit is in direct competition with shredded wheat. Some of our selling points necessarily compare it with shredded wheat. It is a smaller biscuit and fits the dish better, is browner, fifteen to the package. All those things necessarily compare it with shredded wheat; and, at once, the two items are put in comparison in the customers' minds.

When I say I think we have a hundred per cent. distribution in all the better stores, I mean that, in all the better grade stores, our product will be found. That does not indicate the volume of sales. You might have a case of our product and not sell a package. The same is true of yours. That simply means that it is to be found there for sale.

I have seen in self-service stores a supply of chewing gum or some small item by the cash register which the manager wants to introduce and will suggest to the customer. I have never seen a checker with a supply

of shredded wheat or Whole Wheat Biscuit or any big package goods that he could suggest to his customers.

We started the intensive work of pushing Whole Wheat Biscuit in this territory the day they shipped it to us from the factory, and we have been going ever since. They were then shipping it out as Shredded Whole Wheat Biscuit. We have continued our efforts along the lines already indicated from the first, but we have introduced some new ways of merchandising it and getting the message to the consumer. The extent of our effort has been continuous in getting it under way. I would say we put more effort in the last two or three years than before, since the National started distributing shredded wheat direct to grocers, and we have had more co-operation from our jobbers, who are not particularly pleased with being deprived of shredded wheat and are more willing to co-operate with the Kellogg Company. The reason probably is that they co-operate with us very well on all our Kellogg line; and it is just another Kellogg item to the jobber. At the same time, it was a new item that they could use in place of shredded wheat.

In my district, there are army bases, who call for bids on regular forms, including specifications, which sometimes read shredded wheat. They usually do. I believe Fort Cooke, especially, specifies shredded wheat, twelve-and-a-half-ounce package. On the others, it is all cereal wheat, and Kellogg's Whole Wheat Biscuit is put in. A twelve-and-a-half-ounce package specification could only be filled by our product. That form of specification was not suggested or introduced by me to the Army Base. I do not know who suggested it.

Army bids usually specify shredded wheat or similar, or shredded wheat product, the Army Bases. All Army bids call for the twelve-and-a-half-ounce packages. I think I have seen shredded wheat, twelve-ounce package on some bids. I scratch that off and write in:

Kellogg's Whole Wheat Biscuit, twelve-and-a-halfounce package. It is up to them, whether they want to accept the substitute or not, in that particular instance. Sometimes they do, and sometimes not. We do not - always get the business. The Army posts are particular about specifications. When they ask for shredded wheat, they have sent some of them back, in some cases. In others, we have succeeded in getting the business. We have bids for all the institutions in the State of Nebraska, asylums, hospitals, penitentiaries; all bid on by the jobber. I have seen their specifications, which call for Kellogg's shredded wheat biscuit. They specify our brand, which is doubtless the work of our sales organization. We showed them our product, and they have liked it and specified it. I have never seen a State bid that specified shredded wheat. I would not say that was universal with State institutions. All I know is what I have control of, one set of State institutions here, who bid through the Board of Control at Lincoln, Nebraska. Those are all bid upon and filled by jobbers. I do not really have anything to do with that at all. We just supply the jobbers. We do take Army Base orders direct.

RE-DIRECT EXAMINATION.

The Witness: The bids specify wheat, shredded. That would be correct, as far as I know. The Shredded Wheat Company emphasizes, by placards, and so forth, that there are twelve big biscuit and twelve ounces. I think I have seen the word big biscuit in newspaper advertisements, and on placards. I have also seen the big placard representing Niagara Falls, with "More power to you," at the top, and "twelve big biscuit," down at the side.

RE-CROSS-EXAMINATION.

THE WITNESS: I recognize the printed list, Plaintiff's Exhibit 233, dated January 1, 1932, headed:

"Board of Control, Lincoln, Nebraska, specifications for Class 2, groceries, canned goods," and so forth. I have seen them. I do not know whether it is just like this one, but it is the regular form they put out. recognize this as a form the Board of Control puts out at Lincoln, the regular form for bids on that class of I notice item 142, wheat, shredded, biscuit, Kellogg's, twenty-four, twelve-and-a-half-ounce packages to the case, under the head of cereals. I do not see any other mention of shredded wheat there. Placing it on there in that particular manner is not the result of Kellogg salesmanskip. Samples were shown to the Board of Control, also to the superintendents and stewards of each institution, our complete line. They picked out what they wanted and put it on the specifications that went into the Board of Control. they get various inquiries from the various institutions, they put it on that Key Sheet. Then our salesmanship is exercised on the buyers of the various institutions to call for biscuit, and we give them that information on it. It calls for twenty-four twelve-and-a-half-ounce packages to the case. That is the way ours are packed, I do not think the National packages are packed that same way according to that same specification. I do not believe they would fit it.

RE-DIRECT EXAMINATION.

THE WITNESS: All the information on this Board of Control list could be secured from anyone with a case of Kellogg's biscuit before him. Plenty of literature of the Kellogg Company tells that the packages are twenty-four to the case and twelve and a half ounces to the package. In addition, we have sampled all the stewards and superintendents of every institution with all our products several times.

It is very difficult to even get a hearing of the Board of Control as to what they put on there. These requests to the Board of Control come from the institutions that are to use the product. They make requests, and the Board of Control consolidates them in a list for general bidding, simply a Key Sheet to guide them on all these different items in their bid.

MRS. WILLIAM BURGER.

Deposition taken at Omaha, Nebraska, April 19, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, with my husband only, no children, and I am a consumer of Kellogg's Whole Wheat Biscuit. My grocery store had a special on cereals one day. She often asks if she may send me, this or that. I usually say yes, because she is a reliable girl. This happened to be a bundle of Kellogg cereals with Whole Wheat Biscuit. It was new to me. We liked it very much. We have used it ever since. When I was a girl at home, they had Niagara shredded wheat, but I never used it, because it is a much largersized biscuit than I care to eat, anyway. I have not used it in recent years. I now use Kellogg's biscuit and have used quite a lot of it in a month. We have had quite a few guests. I always ask for Kellogg's Whole Wheat Biscuit and have no trouble getting it, through my store.

CROSS-EXAMINATION.

THE WITNESS: My grocer is Mr. Bichel. I remember shredded wheat when I was home, as a girl. I recognize the package, Plaintiff's Exhibit 1. That is the package my mother served from at that time. I can remember it always, not a great deal; but, I remember

we did have it. When I commenced keeping house myself, I never bought it or had any in the house, probably because I thought it was a little too much for a serving. When my grocer sent me this little sample package, I tried it and liked it. That was probably a month ago.

RE-DIRECT EXAMINATION.

THE WITNESS: I was not brought into the case through anybody connected with the Kellogg Company. I think Mrs. Gillogly gave my name as a user of Kellogg's Whole Wheat Biscuit.

MRS. ALICE MAY GILLOGLY.

Deposition taken at Omaha, Nebraska, April 19, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, with three in the household now. My mother is with us for a time. We use Kellogg's Whole Wheat Biscuit. We have used other Kellogg products for quite a while and the biscuit within the last year or so. I have always used Kellogg's Bran Flakes and things like that. The grocer suggested it one day. I bought it, and we all liked it very much and have continued to use it ever since. We have used the other biscuit, Niagara shredded wheat, quite a while ago. My mother used to use it; but I have not used it for several years. I used it before I was married, but not in my own married household. I have continued to use Kellogg's Whole Wheat Biscuit as a cereal. I order it by that name and have no trouble getting it. I have never had shredded wheat of Niagara Falls. delivered to me when I asked for Kellogg's shredded wheat or Kellogg's Whole Wheat Biscuit, because I trade at a cash-and-carry store. I wait on myself there.

· CROSS-EXAMINATION

THE WITNESS: I was familiar with shredded wheat for a good while. I knew what it was, knew it at home. My mother used it. I have eaten it at home but not in my own home. My husband never used it. I use the other, and he eats that. It was first suggested to me by my grocer who asked me to try it. I did so, because we always use Kellogg's for muffing and All-Bran and things like that. I have used a lot of Kellogg products.

My husband is head of the securities department of an automobile finance corporation. I came here today to testify, because the grocery man gave my name to a man who came out to see me. I told him about these other girls. We all play cards together. We all came down here together. We are all users of Kellogg's Whole Wheat Biscuit. My grocer is the Hinky-Dinky Store, corner of Leavenworth Street, a self-service, cash-and-carry store.

RE-DIRECT EXAMINATION.

THE WITNESS: I just go in the store, wait on myself, and check out with my goods. They have both kinds there, also all the Kellogg products. I have seen the Niagara Shredded Wheat Biscuit there.

MRS. HELEN E. BARRETT.

Deposition taken at Omaha, Nebraska, April 19, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, with five in the household, and I am a user of Kellogg's Whole Wheat Biscuit, the only shredded whole wheat biscuit used in my household at the present time. It seems to me I have known about it a year and a half or so. I used

Kellogg's Corn Flakes and Rice Krispies and liked them. I saw this on the shelf in a practically selfservice store and asked for it and tried it. The rest of the family like it and we have continued to use it.

I have used the other Niagara or old shredded wheat, quite some time, about five or six years. We have youngsters at home. We like Kellogg's biscuit better than that. It seems to me it has more taste. Cream seems to make the bottom of the Niagara biscuit sort of soggy. This is better toasted, and I like the size. I have no trouble in buying it in stores where I wait on myself. I get it through my grocer, too, ordeling it by telephone as Kellogg's Whole Wheat Biscuit.

CROSS-EXAMINATION.

THE WITNESS: I may have asked for Kellogg's shredded wheat, but I do ask for it as Kellogg's Whole Wheat Biscuit. I am familiar with the old shredded wheat and knew it at home. I had it in my own home when I was first married, a few times. When I tried Kellogg's biscuit, I have not had any shredded wheat since, and I had had none for some time, then. I have bought Kellogg's biscuit since then.

I do not remember what kind of box I first saw Kellogg's biscuit in. I have seen it on the display shelf in a cellophane window box, but I do not remember the first one. It had the picture, like the other side of Plaintiff's Exhibit 161, and I saw the two biscuit in the dish. It was new to me, so I thought I would try it. When I saw it, it reminded me of shredded wheat. It looked like shredded wheat to me. . My grocer is the Miller Park Grocery, Mr. Loreas. I sometimes go to the store and sometimes order by telephone. I suppose I might have asked him for Kellogg's shredded wheat at times. I serve it at home usually with fruit and cream. I do not bring the box on the table. It is served in the pantry and brought on the table in a dish. My husband is a pharmacist. I am one of the bridge party who all came down today.

RE-DIRECT EXAMINATION.

THE WITNESS: I did not know anyone connected with the Kellogg Company.

MRS. JOHN E. HENLEY.

Deposition taken at Omaha, Nebraska, April 19, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife. There are just two in my household, my husband and I. We are users of Kellogg's Whole Wheat Biscuit. I have known of that product approximately a year. I was at a friend's house. She had it. I asked what it was. Since then, I bought it. I purchase it by telephone as Kellogg's Whole Wheat Biscuit and have no trouble in getting it. We had the old Niagara shredded wheat at home a lot, but I never used it until after I was married, and then I got this. I like the Kellogg biscuit very much, much better than the other, because the other one seems to get so soggy, and this one does not.

*Cross-Examination.

THE WITNESS: I had known shredded wheat in this package, like Plaintiff's Exhibit 1, and had it as a girl at home. I used it at that time. After I went to house-keeping, I did not buy any until I tasted this shredded Whole Wheat Biscuit of Kellogg's. I did not use it at home. I have been keeping house about four years and use a lot of dry cereals; but I have not been buying any shredded wheat. I first came across the Kellogg

product at some friend's house and liked it. I have been using it since. I have not bought any shredded wheat since. My husband is with a finance company, a different one from Mrs. Gillogly's husband, different line.

RE-DIRECT EXAMINATION.

THE WITNESS: I did not know anybody connected with the Kellogg Company before Mrs. Gillogly spoke to me about this.

EDWARD DELANEY.

Deposition taken at Omaha, Nebraska, April 19, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am manager of the Redick Tower Grocery Company and have been in the grocery business about six months. I was an efficiency man before that for Anthony, who has ten meat-markets here in town. I was in that business for six years. We are an independent grocery store with just one store; but he still owns the ten meat markets. We are self-service, cash-and-carry, and we do not make deliveries. He employs, in meat and grocery departments about thirteen, of which six are in the grocery.

We carry Kellogg's Whole Wheat Biscuit in that store; also, Niagara shredded wheat. There is a consumer demand for both those products, or I would not have them on the shelf. We sell mostly the National shredded wheat, about sixty-five per cent. or more, and

thirty-five per cent. of Kellogg's.

I have not been there long enough to tell whether the Kellogg product is a growing demand. Since I was there, we have never advertised either product. Both of them have been advertised in that store. They sell both for the same price. We are self-service; but

we wait on customers of they want us to. If we see a puzzled customer, we approach him and help him, if we can. Otherwise, they wait on themselves and bring the goods to the checking counter and pay out. Our clerks never practice substitution in helping customers. If a product is asked for and it is not in stock, they naturally try to make a sale by suggesting some other item near that product. I would not really call that substitution. That would be merely making a sale, where we explain we do not have it but have something else. A substitution would be where you have never carried the product and carry a substitute. we did not carry the product at all, the answer would be that we do not handle it, but we will have it in a short time. We would not try to sell that customer anything else in the meantime, but, if it were a nationally-advertised product, we would try to have it soon.

If I asked her to try a new nationally-advertised product, I would not call it substitution. If it was not nationally advertised, I would call that a substitution, because you are really substituting something not advertised. Bread would be a little different item, but if a customer asked for a certain kind and I told her we did not have it but I would like her to try another

kind, I would, I believe, call that a substitution.

As a rule, when we put in a new product, we put it in the window, make a floor display of it, and explain it to the customers as we go along. We aim to solicit our whole trade at the same time to try the product, on sale days, as a rule. The creation of consumer demand for Kellogg's biscuit must have occurred before I came to the store. As a rule, they come in and ask for shredded wheat. When they ask for Kellogg's, they ask for Kellogg's Whole Wheat Biscuit. I do not find a bit of confusion between the two products in our store. I never have had either one sent back with the statement it was the other they wanted.

CROSS-EXAMINATION.

THE WITNESS: What I meant when I said we do not practice substitution and emphasized the word practice, I meant we do not practice it. It is a self-service store, and we really do not have the time. We have little occasion to, in any way. We sometimes see a puzzled customer. It is natural not to let a customer

get away.

If I saw a customer looking for something, went up to her and asked if I could help her, and she said she was looking for shredded wheat, and I happened to be out of it, I might call her attention to Kellogg's Whole Wheat Biscuit. I will not say we are out of either of them. We always keep them on hand. That might occur, however, that might be called a form of substitution, although I would tell her what I am giving her. You really explain it to her when you are making the substitution, "Would you mind trying this?" That is what you would naturally say. I have found you can hardly push an article on a customer. Nowadays, they know what they want. If they want Kellogg's or Puffed Wheat, they know what they want.

I have known shredded wheat for quite a while, a long while. When I got my grocer experience, my father used to run the store, and I knew it then. I have been brought up in the grocery business all the time. My father always had shredded wheat in the store, for many, many years. When he ran the store, we always had it. I do not remember Kellogg's Whole Wheat Biscuit then. Shredded wheat was the only kind on the market, and it was always known as shredded wheat; but my actual personal experience has been in the present store I have told you about. When I went there, it was fully stocked; so I am not personally familiar with the bringing in of Kellogg's biscuit and

the means used to introduce it.

RE-DIRECT EXAMINATION.

THE WITNESS: I have not had customers ask for Kellogg's shredded wheat. They have always specified Whole Wheat.

HERBERT BICHEL.

Deposition taken at Omaha, Nebraska, April 19, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a grocer, operating a grocery store with my father, under the name of Henry Bichel, a general old-line independent retail store. I have charge accounts where they are justified, make deliveries, and take telephone orders. We serve the customers. We handle Kellogg's Whole Wheat Biscuit. I think we had it just as soon as they put it on the market here. There is a consumer demand for that product. We also handle the Niagara shredded wheat and have for some years, as long as I have worked there, seventeen years. The Niagara biscuit sells the most in our store, about two to one: We have customers ask for Kellogg's shredded wheat. We give them Kellogg's Whole Wheat Biscuit. If customers ask for shredded wheat, we ask them if they want Kellogg's or the other. We do not try to push or substitute. If someone asks for an article, we try to find out what it If they say shredded wheat, we would ask them whether they wanted Kellogg's or Niagara.

After Kellogg's biscuit was on the market, but before I adopted the practice of asking which one she wanted, it has happened that, when I gave them Niagara in response to a request for shredded wheat, the customer turned it back and said she wanted Kellogg's. Our present practice is to ask anybody who calls for shredded wheat whether they want Kellogg's

or Niagara, just as with bran flakes or corn flakes, we

say, "Which one?"

The two products sell at different prices. The Niagara is the highest, selling two for a quarter; and Kellogg's sells for ten cents. We do no advertising in the newspapers; nor do we do display advertising in the way of pamphlets or circulars. We treat both products alike. As a retailer, I have not done anything to create consumer demand for the product, just leaving that up to the manufacturer to create a demand for his own product. If someone wants something different, they could try another thing. That would be the only way. If they get tired of the same coffee, you can suggest another coffee.

CROSS-EXAMINATION.

THE WITNESS: My father had that store about thirty years. I have been with him seventeen years, since I was in high school. All the time I have been with him and before, I have known about Shredded Wheat, like Plaintiff's Exhibit 1, to the best of my knowledge, and my customers have known about that, to the best of my knowledge. It has been a household word and a well-known article, shredded wheat, since I have known it. Before Kellogg's biscuit came on the market, I cannot remember anything similar to it on the market. When customers asked for shredded wheat in the old days, I knew right away what they wanted, and it was just this one package that filled that same order. Then came Kellogg with Whole Wheat Biscuit. I cannot remember when the confusion among my customers or between me and my customers as to which one they would want, arose.

We have had Kellogg's Whole Wheat Biscuit since they have been out. We stocked them right away, just like any other breakfast food. I could not say if it was Kellogg's Shredded Whole Wheat at that time.

I cannot remember the name on the package before. I know what is on there now. I do not remember when it was called rellogg's Shredded Whole Wheat Biscuit.

I cannot remember whether customers who were former users of shredded wheat are now users of Kellogg's biscuit, or whether they are new shredded wheat users. It is a fact that I sell both articles now. Since Kellogg's Whole Wheat Biscuit came on the market, it has gotten up to where it sells in our store at least half as much as shredded wheat. Some people have called for shredded wheat and then rejected the National product we sent them, which may have indicated that, in those customers' minds, at least, there was another shredded wheat. So far as our store is concerned, at the present time there are two shredded biscuits. I cannot remember the name on the package. I have handled plenty of them. I cannot say if Plaintiff's Exhibit 161 is the package I have in my store now. It says Kellogg's Whole Wheat Biscuit. Then, they are put out like that right now. We have had some packages with the window in it. We have none now. The last few cases did not have any. I do not know whether the salesman let them order it. I do not believe there was one like that to a case.

When a customer asks for shredded wheat, in order to keep from making a mistake, I always ask her. If she asks for shredded wheat, I ask her whether she wants rellogg's or the Niagara shredded wheat. It is fair to say that some of those customers have been users of shredded wheat and are now users of Kellogg's biscuit. In cases like that, we know what they want, and we do not ask. As in coffee or bread, with a lot of regular customers, we always know and give them what they want. When we do not know what they want, we take no chances on confusion. I know which one they mean when they say shredded wheat.

AUSTIN D. CREW.

Deposition taken at Omaha, Nebraska, April 19, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a grocer, with a retail grocery store, Charles D. Crew & Son. It is a service store, making deliveries, and carrying charge accounts where justified. We have four assistants in the store, no self-service. We carry Kellogg's Whole Wheat Biscuit, also the old Niagara shredded wheat. Those two products sell, in our store, about half-and-half, right now.

Some customers call for Kellogg's shredded wheat, some for Whole Wheat Biscuit, and some for Kellogg's Whole Wheat Biscuit. I do not know exactly whether they ask for Kellogg's shredded wheat biscuit or whole wheat biscuit. If a customer asks me for shredded wheat, my usual practice is to get her the old style, Niagara shredded wheat. If we know she might want Kellogg's, we tell her we have both, give her a preference. Lots of times we know what they want. If a customer asks for shredded wheat, we sometimes ask her what she wants, maybe in the case of a new customer when we did not know what she wanted. I do not believe we have had any sent back with the statement she wanted, the other one. They usually sell for the same price, a dime a package.

We have sometimes given the Kellogg Company co-operation in creating consumer demand for its biscuit, about the same treatment as we have given the National. There is a genuine consumer demand for both products in our store. We buy the Kellogg product through the jobber, through the Buy-Rite Association, not a Kellogg salesman. We buy the National product from the National Biscuit salesman, the same

one who takes orders on crackers and cookies. We handle practically the full National Biscuit line, in-

cluding shredded whert biscuit.

We handle the full Kellogg line, and Kellogg products are very good selling products in our store. Buy-Rite is a voluntary buyers' chain organization. They work through the wholesale house of Holmes-Wildhaber, mostly, owned by Mr. Holmes.

CROSS-EXAMINATION.

THE WITNESS: We probably advertised both products at different times, either in our Buy-Rite Association ad in the newspapers, or just on our individual circulars. I would not say that 50 per cent. of Kellogg's biscuit sales are wholly or largely at the expense of Shredded Wheat. I think shredded wheat sells as much as it ever did. I know there are some of our customers who have switched over from shredded wheat, who used to buy it, and no longer buy it but buy Whole Wheat Biscuit.

My family has been in the grocery business twenty-five years. I have conducted this present store five years. My mother and elder brother were in it before, in fact, the whole family. It is an old service store of long standing, and my connection with it has been since 1914, about nineteen years. During that time, we were carrying the old shredded wheat. I have been very familiar with it. For years, there was nothing like it. It was a well-known name. When a customer asked for shredded wheat in those days, I knew right away what they wanted. There was no question about it. It is fair to say that shredded wheat was a household word. I imagine it was made so by the efforts of the old Shredded Wheat Company, introducting their products as a new product, and teaching people to use it and like it.

Now, sometimes, when a customer asks for shredded wheat, I have some doubt what they mean, because I have this new kind of shredded wheat which resembles somewhat the old shredded wheat. In that event, I ask them which they mean. When I do I find that, sometimes, it is the Kellogg product they want, and sometimes the shredded wheat. It does not make a lot of difference. Sometimes they are willing to take either one. Sometimes they say they want Kellogg's biscuit.

WILLIAM T. KLINE.

Deposition taken at Omaha, Nebraska, April 19, 1933.

DIRECT EXAMINATION.

The Witness: Lam buyer for the Hinky-Dinky Stores, Omaha, self-serve, cash-and-carry chain of thirty grocery stores, twenty-seven of which are in Omaha. Those stores carry Kellogg's Whole Wheat Biscuit and Niagara shredded wheat. There is a consumer demand in the stores for Kellogg's Whole Wheat Biscuit. At the present time, of the two, we are selling more Kellogg's biscuit. Our stores cooperate with Kellogg in creating consumer demand for the biscuit, by coupon sampling and different things on that order; advertising, literature, pamphlets, etc., and we advertise it ourselves. We have distributed with it Jungle Land Books and the Wheel of Knowledge.

There is no confusion whatever between these two products in our stores. We do not have one returned with the statement the other one was ordered or wanted. We have both items on the shelves, and the customers pick out what they want and check out at the counter, so there is really no confusion between

them. The retail price is the same on both products. We do no wholesaling, have our warehouse, but just to take care of our stores.

CROSS-EXAMINATION.

THE WITNESS: The wholesale price on Kellogg's is a little better than on shredded wheat; so we make a little more on Kellogg's. I have personally been in the grocery business about ten years, and with the Hinky-Dinky about seven years. I am assistant buyer. Sam Newman is the head buyer. I am connected with headquarters. Mr. Newman, the president, has charge of the retail outlets. I assist him. We do all the merchandising and everything. We direct the merchandising policy of all the thirty stores.

I have been familiar with shredded wheat for many years. It is an old product. I have known it as shredded wheat, and we still purchase it and carry it in our warehouse, distributing it in our stores, as called for. Until Kellogg's biscuit appeared on the market, it was the only product of its kind, as far as I know. Now, we have two products, equally displayed on the shelves of our stores. We exert no salesmanship in our stores, show no discrimination of any kind. We do not display or suggest a new product. We carry Muffetts. I have seen the new Loose-Wiles product, Rippled Wheat, but we do not carry it at all. I do not know whether any retail organization carries it. We carry the Loose-Wiles cracker line, but not the National line. We purchase our shredded wheat direct from National.

I would say Kellogg's biscuit sells three to one of National shredded wheat; all due to the sales efforts put on the item on the part of the manufacturer. I think the Kellogg Company has been more active in pushing this product in recent years. Once in a while,

we advertise these items. We use newspaper ads and feature Kellogg's Whole Wheat Biscuit sometimes. We have not featured shredded wheat for six months to a year. Whenever we advertise it, we have special prices. The fact we have not featured shredded wheat for some time might, to some extent, account for the sales of Kellogg biscuit; but the sales of Kellogg's biscuit passed those of shredded wheat before we stopped advertising shredded wheat. We have made no attempt to push shredded wheat at the present time.

RE-DIRECT EXAMINATION.

THE WITNESS: There is a special reason why we do not push National shredded wheat. They will not sell us on a direct basis as other manufacturers do.

RE-CROSS-EXAMINATION.

THE WITNESS: We buy through the National but not as a jobber, as a retail outlet. We do not get the regular chain store discount. We get 15 per cent., and we think we should get seventeen and a half, but they do not see it that way, so we are not particularly interested in National shredded wheat.

RE-DIRECT EXAMINATION.

THE WITNESS: We just have shredded wheat in stock, in our warehouse, for the stores that desire it.

We do not do anything improper.

The self-service type of store is, I think, gaining in popularity in my territory. I think people are getting more independent and like to do as they please, do not want to be bothered, like to pick up a package and examine it and put it down again. They depend on their own judgment more than in the past. Our stores have uniform fronts.

RE-CROSS-EXAMINATION.

THE WITNESS: The Kellogg Company gives no inducement for advertising their products, except occasionally they have a deal on it, one case free in ten, or something like that. They do not in any way participate in our advertising expense when we have a free deal or something like that, no advertising allowance whatsoever.

R. L. DEYO.

At Denver, Colorado, April 21, 1933.

Mr. CLARKE: It is stipulated, with the same force and effect as if the witness had been regularly called, sworn, examined, and cross-examined, that R. L. Deyo, manager of the Skaggs Store at 2412 East Colfax Street, if called as a witness in this case, would testify that he is regularly carrying both Kellogg's Whole Wheat Biscuit and the original shredded wheat; that the price of the Kellogg's Whole Wheat Biscuit is twelve cents per carton, and of the original shredded wheat is ten cents a carton, and that he sells about the same quantity of Kellogg's Whole Wheat Biscuit as he does of shredded wheat; that his store is a regular self-service store, in which the customer comes in and takes a basket and goes to the various shelves and helps herself, then pays for the products at the check-out counter; and that he would also testify that, for many years past, he has handled shredded wheat, and that it was called for as shredded wheat.

Mr. VILAS: Yes; and that he has had the Kellogg product a comparatively short time.

PAUL COPELAND.

Deposition taken at Denver, Colorado, April 21, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am district sales manager of the Kellogg Sales Company and have been connected with them twenty-two years. The first six years, I was salesman and advertising man, regular work connected with selling to retail stores. I went to the Denver office in December, 1917, as Denver district sales manager and have been such ever since. We have in our territory, Colorado, New Mexico, Southwest Texas, Arizona, Utah, Southern Idaho, Montana and Wyoming.

Taking the territory as a whole, I would say we have secured from 75 to 80 per cent. distribution of our Whole Wheat Biscuit in the better grade stores, and about the same in the restaurant and hotel trade. Of our restaurant and hotel trade, 95 per cent. is in individuals and 5 per cent. in the large packages. We would rather sell individuals nothing else to serve, just enough, so the customer who asks for it will get the individual package. The Kellogg Company believe it is more sanitary to use individuals than regular packages. We have a mixed case of several of our products for the hotel and restaurant trade, giving us practically the same distribution on biscuit. We sell a lot of biscuit separately, sixty packages to the case. It is the policy of the company to push the sale of individuals as much as possible. We want them served in the individual carton wherever possible. At a lunch counter, the individuals are on the counter, and the girl will bring a package down, put them in the bowl, and set them in front of the customer.

From our past work, we know if Kellogg's biscuit are on store shelves, especially in self-service stores,

they will repeat, once we have done our work of sampling, or postcard deal, or house-to-house work. We know consumers will come back, because they like the biscuit. We have had best success in self-service stores, because the consumer can take any package she wants. Through those methods I know a consumer demand has been created for Kellogg's biscuit, because we have done research work on consumer demand and know they are coming back and buying more. Our man in Iowa tells me we are selling as many of our biscuit as the other people are selling Shredded Wheat.

Over the territory we do one thing in some sections and another in others. We have done house-to-house work, selling the housewife a package and giving her one free. They get enough of it in two packages to try it and like it. We have not had to do so much follow-up work on that. We have sampled in various localities, with not so much newspaper advertising in cities as out in the territory. We have gone into Albuquerque, Tucson, Phoenix, Cheyenne, Casper, and Pocatello. We can do that because the newspaper advertising does not cost much. After the right kind of distribution newspaper advertising was released.

The territory has been throughly worked in those various ways. The business in our biscuit is increasing. We have a fifteen per cent. increase this year over last.

We have not had a single complaint of confusion in my district between Niagara shredded wheat and Kellogg's Whole Wheat, from a jobber, or retailer or grocer or consumer. I have not heard any instance of a package being sent back with the statement the other product was wanted and ordered.

The methods we have used in pushing the sale of our biscuit are very much the same as those we used pushing other products, like Wheat Flakes and Corn Flakes. We have done the same work on biscuit

as we have on the other. Those are methods used in introducing any new product of Kellogg.

We have encountered competition on Corn Flakes and Wheat Flakes, and cereals of that sort. Other manufacturers work more or less along the same line we have. I was connected with the Kellogg Company when the Shredded Wheat Company had the Niagara Falls biscuit. I would say they did more work then than now. Every year, sometimes twice a year, we would see their sample wagon in the territory, working them thoroughly. I do not remember when they sampled last. We have not encountered National Biscuit competition in the last few years such as we had from others. I have seen no sample wagons in the district recently. I happened to know the man in charge of this territory until National took them over. He told me he understood practically all the offices in the United States had been closed.

I know, of my own knowledge, of a change in the method of distributing shredded wheat after the National took over. At the time the old Shredded Wheat Company was in this territory, it was distributed solely through jobbers. I know the National is now selling shredded wheat direct to the retail grocers. The National Biscuit continues to sell the wholesale grocer; but quantity buyers, larger retailers and chains, get shredded wheat biscuit at the same price jobbers do. When the change was made, jobber after jobber told me they were going to discontinue the National line. I know a number who did dis ontinue the line but later put it back. They tell me they handle it merely to give service to the retail grocery man. I do know some jobbers discontinued handling it.

We have had Saturday sales in this territory, putting a salesman in the store to sell three packages and give one free. We have used premium cups, Wheels of Knowledge, and Jungle Land Books, in con-

nection with the sale of Whole Wheat Biscuit. We have also used the coupon system on a mailing list furnished by retailers, redeemable in a free package by buying one package.

Retail dealers have co-operated with us very well; because they know these methods will sell the merchandise, and they will have 95 per cent. newspaper advertising and little handbills. We have made no

advertising allowances for those.

The self-service is a growing type of store in this territory. We have chain store distribution in the territory as a whole. One chain in the Denver market, the Safeway, does not handle our biscuit. The other chains do. The prices on the two products are rather even. Ten, eleven and twelve cents a package are the prices. In some instances our package costs one cent more. In the main, they are about the same.

In pushing sales on our biscuit in competition with the original or Niagara product, we have emphasized the fact that we have a tastier biscuit that will fit the bowl, fifteen to the package, toasted on both sides. Once we sell a customer, we find they come back for

more. Our packages are a half ounce heavier.

I have noticed in this territory that the National have emphasized their product as twelve big biscuit in the package. I have seen their store placards with the Niagara Falls picture made very prominent.

CROSS-EXAMINATION.

THE WITNESS: When I said that a customer will repeat once we sell him, I did not mean that a hundred per cent. People break away. They may go to some other cereal. I mean, if we go into a town and do our work, sell the consumer, the merchants' business repeats. There is some repeat on it. Some merchants have tried it and discontinued it, too. I do not mean

to be understood as saying every consumer who happens to purchase a sample of our biscuit immediately becomes a user of it. We do not convert them all. I mean that, when we go into a town and put on Saturday sales, and sampling, we find when we go back that it has been repeating. When we get it started, it will go. I do not claim at all that we have converted all Shredded Wheat users into users of Kellogg's biscuit.

The territory under my jurisdiction is one of the more sparsely settled sections of the United States, with some cities, but the territory is not so largely settled as in some of the eastern sections. When I describe our distribution as being 80 per cent., I have reference to the entire territory, as a whole. I do not mean to be understood as saying that we have distributed samples throughout and our product is carried in all the various sparsely settled rural sections of this district. I will say that, generally speaking, the better class of stores have our biscuit, all through the territory. There is a large amount out through the territory; but I would not say they have gotten into every little store. The National Biscuit Company have a hundred per cent. distribution on Niagara shredded wheat in this territory, as close as you can call a hundred per cent. on any product, through our market. In the little stores, some of which do not carry our product, they carry shredded wheat. It is a pretty good seller.

There are country districts, however, miles and miles of ranches and many acres of ground, in this territory, in which there is hardly any habitation and such stores as there are are just general stores. We have gone into those country districts, but we have not worked the districts at all. We have gone into a few of the better stores. We do not claim we have anything like a hundred per cent. distribution in chain stores in this district. I think we are selling prac-

tically all the chain stores in the territory. We never asked Battle Creek for newspaper advertising in Denver, because we spent more money working outside points, figuring we will get more results to the dollar. We have had the Red & White, and the Home Owned. In the Home Owned we have 50 per cent., and in Red & White, ninety-odd. They are repeating.

I do not mean to say the National has just laid down on shredded wheat and done nothing about it. We see their advertising, and they are doing some work. They did some extensive sampling in Denver last summer; but, as a comparison, I do not believe they worked them as hard as in years past. I do not know of their doing sampling the year before that.

I said there is no confusion among jobbers. A dealer knows them apart. They are entirely different-colored and different-shaped packages. I do not think a jobber could make any mistake, on account of the price. We have a two-dozen package, whereas theirs is thirty-sixes. Even a checker would catch it. On prices there is usually no confusion in the two cases.

I know our product is sometimes asked for as shredded wheat or Kellogg's shredded wheat. In fact, it was called Kellogg's Shredded Wheat a couple of years ago. I can see how it could happen that an order for shredded wheat would be filled with our package, if the merchant only had our case in the store. I think the consumers pretty well know what they are getting. There is a big difference in the two packages. It may be that consumers are often not very discerning.

We bid only on some government business; but that does not apply here. We have so bid in the southern part of the territory, direct out of Denver on some El Paso army business only. We sell no Government institutions direct. We permit that to go through jobbers. We get invitations both ways, either calling for provisions of shredded wheat, or specified

more in detail. Where we work with them and sell them our line, we ask them to specify Kellogg's Whole Wheat Biscuit. They have some through that way. We have been successful in some instances. In others the specification is for shredded wheat. Our jobbers will bid on those and supply our product.

RE-DIRECT EXAMINATION.

THE WITNESS: If they bid our biscuit, they change the name and weight of the package.

RE-CROSS-EXAMINATION.

THE WITNESS: At the Fort, they will all the time ask for shredded wheat. We will ask the jobber if he will not ask for Kellogg's Whole Wheat Biscuit, twelve and a half ounces. Ordinarily, they will just stick in bids at a price, without changing it. I know that. I hear about those things and endeavor to contact the proper army officials, to get them to specify Kellogg's Whole Wheat Biscuit.

Defendant's Exhibits 110-A and 110-B are a request for bid for Fort Logan, cereal wheat, shredded, Kellogg's ninety-six packages, dated April 11, 1933. I believe I can get you more from the office that read the same. I do not know that, until very recently, they have always specified shredded wheat. We get copies of those from various points.

We sell the Piggly-Wiggly Stores, or the Continental, which is their wholesale name. Our biscuit are not in those stores in this district, nor in the Safeway Stores, owned by Piggly-Wiggly. We have put on several sales in Safeways; but I cannot tell offhand whether they handle it or not. I do not think so. That is one chain not handling it: Piggly-Wiggly, Safeway, MacMarr, a large chain.

100

RE-DIRECT EXAMINATION.

THE WITNESS: We have hopes of being able to sell them. The Safeway here is a branch of the West Coast chain. This unit comprises only about ten or fifteen per cent. of Safeway. I know on the West coast, Utah, Arizona, and in our part of Texas, Safeway are handling our biscuit. This is the one branch we have not sold. The branches operating from here, at Colorada Springs, Lamar, and Grand Junction, are handling our Whole Wheat Biscuit.

RE-CROSS-EXAMINATION.

THE WITNESS: To put it in a word, we are trying to give shredded wheat a good run, anyway.

(A package of Egypt Stick Candy, with picture of a camel, was marked "Defendant's Exhibit 111.")

The following photostats of newspaper advertisements referring to early shredded wheat operations and products, also advertisements of grocers referring to shredded products, taken from newspaper files obtained from the records of the publishers, or from the records of newspapers in the public library containing complete files of the newspapers in question:

Page 5, Denver Times, Saturday, March 17. 1894, Defendant's Exhibit 112.

Page 5, Denver Times, Saturday, March 10, 1894, Defendant's Exhibit 113.

Page 8, Daily News, Denver, Wednesday, July 17, 1895, Defendant's Exhibit 114.

Page 8, Daily News, Denver, Sunday, July 14, 1895, Defendant's Fxhibit 115.

Page 8, Daily News, Denver, Saturday, July 27, 1895, Defendant's Exhibit 116.

Page 8, Daily News, Denver, Sunday, July 7, 1895, Defendant's Exhibit 117.

Page 8, Daily News, Denver, Wednesday, July 10, 1895; Defendant's Exhibit 118.

Page 8, Daily News, Denver, Sunday, July 28, 1895, Defendant's Exhibit 119.

ANDREW ROSS.

Deposition taken at New York, N. Y., May 3, 1933.

DIRECT EXAMINATION.

THE WITNESS: I was connected with the Ross Food Company at Batavia, New York, organized in the latter part of 1914 or the early part of 1915, but not now in business. I should think it ceased to do business some time in 1916. If you say the United States Circuit Court of Appeals in the case of Shredded Wheat Company against Humphrey Cornell Company and Frederick H. Towne, handed down a decision on February 20, 1918, I would revise that statement and say the company was nominally in business for some little time after that decision was rendered, but that it did not very actively promote the sale of its product after 1916.

We manufactured a shredded wheat biscuit, putting it on the market in package form. Defendant's Exhibit 91 is the carton the Ross Food Company used in its business. It had no other carton except that. Inthose cartons were packed biscuit made from shredded wheat, of substantially the appearance of the biscuit illustrated on Defendant's Exhibit 91. Ten biscuit were packed to the carton.

Q. 17. Did those biscuit get into wide distribution. or what was the fact, when the Ross Food Company was in existence?

A. Well, we had a pretty general distribution in New England and New York, except New York City, a substantial part of Pennsylvania, and scattering distri-

bution in other parts of the country.

The Witness: Those biscuit were first put on the market about the middle or summer of 1915. The Shredded Wheat Company took the action which you described as having been decided by the Circuit Court of Appeals in the Second District. That was not against the Ross Food Company, but against the Humphrey Cornell Company, of New London, Connecticut, and Fred Towne, one of the officers of the Ross Food Company. Our company was located at Batavia, New York, and the Shredded Wheat Company was at Niagara Falls, New York, fifty-nine miles away. The Shredded Wheat Company went to Connecticut and sued one of our dealers there. I believe they also went into Connecticut and sued the Kellogg Company, some years later. I am not familiar with that.

We got into production about the summer of 1915, and it was about October 15, 1915, that Humphrey Cornell and Fred Towne were sued by the Shredded Wheat

Company.

(Copy of record in the case, decision on appeal of which was reported in 250 Federal Reporter, p. 960, and in 163 C. C. A., p. 210, was marked "Defendant's Exhibit 120."

'A photostatic certified copy of the opinion of the majority members of the U. S. C. C. A. in the case, the original typewritten opinion of Judge Learned Hand, containing two deletions, was marked "Defendant's Exhibit 121.")

Mr. VILAS: It may appear on the record that, in response to a short petition for rehearing, the deletions referred to were made by Judge Ward and initialed, and were made after the filing of the

opinion and after the filing of the petition for rehearing.

(The said copy of petition for rehearing was marked "Defendant's Exhibit 122.")

The Witness: Prior to the filing of the suit, the Shredded Wheat Company interfered with our getting the rolls from the people from whom he ordered them, the Brown & Sharpe Manufacturing Company, of Providence, Rhode Island. That delayed our getting started. After accepting our contract and delivering some rolls, the Brown & Sharpe people began to be slow about deliveries. When I called to discover the reason, they finally told me they had a contract with Shredded Wheat Company, under which they could not continue to furnish us with rolls. They gave us the names of others who might be able to make rolls for us, and we had to go to other sources for rolls. We were very much delayed in our operations by reason of that.

I think probably I was served with a summons in the action and was subsequently dismissed therefrom, as being a citizen of the same State as Shredded Wheat Company. There was lack of jurisdiction in the Connecticut court, as against the Ross Food Company. There was a great deal of interference with the shipment of our goods and with our customers at that time, by the Shredded Wheat Company. They bribed the chief clerk of the New York Central freight office at Batavia to give them a list of our shipments as they were made from time to time; and they saw the buyers and tried to persuade them not to handle our product, and intimidated them. A great many of those goods were returned to us. There was publicity with regard to the suit. A man named Wessels, in Philadelphia, was advertising agent of a large group of grocery trade papers, and they worked with him. He prepared a statement in reference to this litigation, submitted it

to the Shredded Wheat Company for their approval, and held it until it was released by the Shredded Wheat Company by telegraph. It was then sent out by Wessels to a majority of the trade papers in the country. I think it was prepared before suit was filed and released by telegraph when suit was filed, held by Wessels in his office until released.

The Shredded Wheat Company wrote to our customers with regard to the suit. I think Reed-Murdock Company, of Chicago, furnished us with copy of letter from Shredded Wheat Company, shortly after they got word through a clerk in the New York Central that we made a shipment to Reed-Murdock. I think there was something said about pending litigation and the possibility of other litigation; but it is a long time ago.

The Shredded Wheat Company called on the Kellogg Company and tried to get them to bring action against us, claiming our machine for cutting the biscuit was an infringement on some machinery Kellogg had. Not succeeding, they tried to buy the Kellogg patent on the cutting machine, to use it against us. That was brought out by Mr. W. K. Kellogg in testimony in an action by the Federal Trade Commission against the

Shredded Wheat Company.

The Ross Food Company also had sample cartons, like the big cartons, one side being a virtual reproduction of this Defendant's Exhibit 91, in miniature size, just large enough to hold two biscuit. The other side had a message to the housewife to whom the sample was given. It was a miniature carton, with the tartan design and figure like the big carton. We had no so-called individual cartons for distribution in the restaurant trade. I think such cartons were not at that time used anything like so extensively as at present in restaurants. Prior to then, my experience was they were used largely for advertising purposes, the theory being we could afford to sell them without profit, because de-

livering to the final consumer in package form had an advertising value. My experience at that time was with Kellogg's Toasted Corn Flakes Company. The idea originally was to get the individual carton to consumers in restaurants, solely as a means of advertising. We sold them without profit. The volume of them was very small at that time, of Corn Flakes. The Ross Food Company had no individual cartons at all.

At or around the time of the Humphrey Cornell litigation the Shredded Wheat Company was using the glass globe displays, filled with their biscuit, in restaurants. In a very general way, I am familiar with the restaurant trade now. It is a long time since I have

seen one of those glass globes.

The Ross Food Company was still in existence in a small way, when Judge Learned Hand's decree was handed down in 1918; but it was not distributing its product to the trade. We experimented as to what might be done to comply with the requirement of the second clause of the modified decree, concerning the marking of the biscuit with a letter, cross, or other plain symbol, although we felt, with all proper respect a to the Court, they had no conception of trade conditions or they never would have made such a decision. For example, we might easily sell a quantity of the goods in this large package to a wholesale greer in good faith, and he, in reselling them to the trade, might sell ninety-five per cent, of them to grocers who might sell them to consumers in this form; yet we would find ourselves in contempt of that decree by goods going out that way into the hards of restaurants, finally sold to consumers outside the carton. We made experiments as to what might be done to mark the biscuit.

We tried to make an impression in the top and found it frequently broke the shreds and distorted the biscuit, spoiling it. When it did not, we found when the biscuit rose in the baking, the marking disappeared.

We tried having a raised mark in the bottom of the pan, so the delicate shreds when they were fed out of the pan, would adjust themselves to that raised portion, so that it might leave a mark in the baking. We found it distorted it and was a very poor mark. We found no practical way of complying with that requirement.

We did not apply, at the end of six months, to be relieved of that second requirement, as being impossible to carry out, because, by that time, our capital was exhausted. We had no resources with which to do anything on those matters. The winding up of that business was caused by this litigation. The experiments we made convinced me it was impossible to mark the biscuit physically. It was obvious a paper tag or band could not be put around the biscuit, except at an expense that would make competition with the Shredded Wheat Company impossible, from a practical standpoint. It would involve the hand banding of each individual biscuit. No machine we could find would do it.

MR. VILAS: In proceeding with the cross-examination of this witness, I understand it is still done with the reservation of the objections made and without the waiving of any objection to the entire deposition.

Mr. Clarke: Oh, yes.

CROSS-EXAMINATION.

THE WITNESS: I was employed at one time by the Shredded Wheat Company, about the year 1901, the latter part, or January 1, 1902, until 1908. I was a clerk in the Niagara Falls office. I was there something like seven or eight months, during which I think I became familiar with the methods of making Shredded Wheat Biscuit. I had occasion to go through the factory, seeing how it was done. Subsequently, I went to Chicago with the company, and I was connected with the

promotional and sales end of the business about seven or eight months out there. I was then recalled to Niagara Falls. For a short period, I was nominally sales manager of Shredded Wheat. Mr. Perky was there and Mr. Alexander Porter, and Mr. Rankin. I said I was sales manager. That was my title, but I had no more authority than any of you gentlemen have. We had an executive committee, and my duty as sales manager was to transmit to the people out in the field the decisions of the executive committee. That is the way I was sales manager. I was their mouthpiece. My discretion in the conduct of the routine business of the company was pretty limited. I did carry out the orders of the executive committee. They made the policies and I tried to execute them. My communications were signed by me as sales manager. That continued, I think, only a few months. After that, I went to Philadelphia and had charge of their office there for five or six years. I had charge of six or seven states, there, and I was a real sales manager in that territory. I think it was pretty much left to me there. During that time, our company was engaged in promotional work. A did sampling, had a staff of demonstrators, and sent machines over the territory, showing people how the biscuits were made. It was Mr. Perky's idea that it was necessary to teach people how to use and like shredded wheat; but a lot of us did not agree with him.

The biscuit Mr. Perky brought out first at Worcester, Massachusetts, and then at Niagara Falls, was among the first cereal food of its kinds but I am not clear whether it was the first or not. It was the first shredded wheat biscuit. I thought you meant was it the first dry wheat cereal. It was a novel product, and people had to be taught to use it. I do not know they had to be taught to like it, because I think it is a natural taste. At any rate, Mr. Perky's idea was to edu-

cate people in the ways of using shredded wheat; and he had a whole school of young ladies who went out and prepared meals for customers. He gave a great

many illustrated lectures.

With regard to selecting Niagara Falls for a factory site, one of the principal stockholders in Shredded. Wheat Company, before they went to Niagara Falls, was Mr. D. O. Mills, of New York. He was one of the leading factors in what was then a new thing, the development of power at Niagara Falls, and one of the principal stockholders in the Niagara Falls Power Company. I think it was his influence that took Shredded Wheat Company to Niagara Falls, to use the power being produced there by the Niagara Falls Power Company.

It was one of Mr. Perky's ideas to have the plant at Niagara Falls, so visitors would come there and see the process of making the product. A great many people did come and see it. That was further carried out by demonstrations on machines in my territory, such as I spoke of, and by sampling crews from house to house. We gave away many thousands of samples and used newspaper and magazine advertising, and all the means customarily used in promoting the sale of a new food product. A great many thousands of dollars were spent.

I was in Philadelphia until about 1908, when I went to Kellogy's. I resigned from the Shredded Wheat. Company and went to the Toasted Corn Flakes Company, the title of the concern at that time. I went immediately to Battle Creek and became sales manager there. I think Mr. Jim O'Brien succeeded me in Philadelphia shortly after that, and then went to Boston. I have known him for many years. He was with the Shredded Wheat Company at Detroit at that time. In 1910, while he was district sales manager for the Shredded Wheat Company in Philadelphia, he was employed by the Kellogg Company, or about that time.

I was with the Kellogg Company until about 1914. Just before I left, I was vice-president and sales manager, and I left because Mr. Kellogg and I disagreed as to certain policies that ought to be pursued. I resigned, either the first of June or the thirty-first of May, 1914. Prior to then I had not even contemplated or considered going into business for myself. Kellogg Company was making shredded wheat then. They started making it, I should say, about 1912. They made a pressed biscuit, that was not permitted to rise. It differed in appearance from the shredded wheat made by the old Shredded Wheat Company, because of the flavor introduced into the wheat. It was a flavored and pressed biscuit. It had been passed through shredding rolls quite different from those at Niagara Falls. They were not the rolls devised by Valentine. The first rolls were made, I think, under specifications of John L. Kellogg, the son of W. K. Kellogg.

Mr. Valentine, a former employee of the Shredded Wheat Company, was employed by the Kellogg Company during the time I was there. While I was with the Kellogg Company, we sold the shredded wheat biscuit. They were not called that. I do not remember what they were sold as, because we never did very much with it. It went all right at the start but did not keep. There was some trouble about the manufacture. The machinery was finally used in putting out loose shreds, Krumbles. We were just getting into that when I was getting out of the picture. It is not clear in my mind. This biscuit was not widely sold, and I think it was later discontinued and it was on the market ever since as Krumbles.

Defendant's Exhibit 123 is a Kellogg's Biscuit carton used about 1910 to 1912. The biscuit marketed at that time had substantially the appearance of the bis-

cuit illustrated on the sides of the carton, as to shape, at least. It is entitled: Kellogg's Whole Wheat, made by Kellogg Toasted Corn Flake Company, Battle Creek, Michigan, and contains an illustration of a plate with three flat biscuit therein. The representation of the biscuit is not far from accurate in color, I would say, because the biscuit we produced was distinctly darker than Shredded Wheat. I think the the sweetening used, when they were exposed to the heat, resulted in the darkness.

Defendant's Exhibit 124, from 1913 or 1914 to sometime in 1915, with front panel entitled: Kellogg's Toasted Wheat Biscuit, manufactured by Kellogg Toasted Corn Flakes Company, and an illustration of a dish with three biscuit thereon, on the ends; and Defendant's Exhibit 125, from 1915 until 1918 or 1919. with, on the front face, Copyright 1910 by Kellogg Toasted Corn Flakes Company. Kellogg's Toasted Wheat Biscuit, net weight, ten ounces, and on the side: Kellogg's Toasted Wheat Biscuit, made from whole wheat, carefully selected, granulated, cooked, shredded, and toasted. In damp weather, heat for a few minutes in a modern oven, with door open, to renew crispness, are so nearly alike, I could not be certain about them at all. No. 125 carries a picture of the biscuit and has on the side: Every package of Kellogg's Toasted Wheat Biscuit is now protected by Waxtite, the perfect package. I do not recall that. It says in ink: used from 1915, to about 1918 or 1919. That was after my time. I left there in 1914. I do not know how much of the Toasted Wheat Biscuit was marketed.

I recall having testified before the Federal Trade Commission in an action against the Shredded Wheat Company. I do not recall this question and answer, reported in the printed record of that testimony, in volume three, at page 1227:

"Mr. Breen: So the height, so far as you know, of the sales of the Kellogg Toasted Corn Flakes Company's shredded wheat biscuit, for the period of operation from 1911 to 1914, did not rise above seventy-five thousand to one hundred thousand cases?

"Answer: Mr. Ross: Somewhere in that vicinity, I think."

I should think that, if that is the record, why that is the record.

At the time I left the Kellogg Company, I had not contemplated going into the shredded wheat business. The following question and answer asked by Mr. Breed of me in that same proceeding, on page 1230, folio 3690, is about in harmony, I think, with what I said before:

"You had considered the question of starting in this business prior to leaving the employ of the Kellogg Toasted Corn Flakes Company?

"Answer: Mr. Ross: Considered it casually, yes."

At any rate, I had probably given it some thought before I left the Kellogg Company, no serious thought. I think it was six or seven months after May 31, 1914, when I left the Kellogg Company, that I proceeded with the formulation of my plans for entering into the making of shredded wheat myself. I do not remember testifying in answer to Mr. Breed that I was considering it but did not begin any plans until August.

I remember going to a meeting of, I think, the National Wholesale Grocers' Association, at Minneapolis. I did answer to Mr. Breed in the same way when I was testifying. That was about the middle of June, 1914. I do not remember talking with Ellis Howland about my plans for going into the shredded wheat business. Reading from the Federal Trade Commission case, from page 1231: "I had a conversation with Ellis

Howland, who is grocery editor of the Journal of Commerce;" he was at that time. He has gone to his great reward now. He was a friend of mine and had been formerly employed by the Kellogg Company while I was there.

My answer, as recorded on page 1232: "I told him that I was thinking of organizing a company to go into the shredded wheat biscuit business; and he tried to dissuade me from it, telling me that he thought the reputation the Kellogg Toasted Corn Flakes Company had established, as opposing imitations, would operate against me in this business I was thinking of launching." Sounds very much like my language. I do not remember it. If I were so recorded, I would not say I did not say it. I certainly do not remember the conversation to which you now direct my attention. That was eighteen years ago. I do not even remember that Ellis Howland was at Minneapolis, although the evidence is he was there.

At any rate, during the summer of 1914, I conceived and undertook the organization of the Ross Food Company, and it was later incorporated. I was busy from then until about August 1, 1915, when we started operating, assembling our machinery and procuring a plant, having our cartons designed and made to start operations. I think we completed our organization about December, 1914. Shortly thereafter, I submitted a biscuit to somebody for a design for the carton, Plaintiff's Exhibit 91, which we subsequently adopted.

I think I recall having a letter from the Shredded Wheat Company about April 26, 1915, of the general tenor that they called our attention to the possible confusion which would result from our making a biscuit like theirs and intimated that they would be disposed to defend their legal rights; but I do not remember it exactly. I could not say the exact time we

received it. I remember the language in substance as you quote it to me from the Federal Trade Commission Records as follows:

"In order to avoid any confusion of your product with ours in the minds of any possible purchasers, we state to you that we consider the form of our biscuit as characteristic, which belongs to us alone; and we shall be disposed to defend what we believe are our legal rights in this respect."

I do not recall consulting our attorney at that time. I know we consulted him in the beginning and we were advised the Shredded Wheat Company patents had expired, or the form of the biscuit had been patented and that had expired, and all this was dedicated to the public, and we were strictly within our legal and moral rights. My recollection is that we did not reply to the letter of the Shredded Wheat Company in 1915.

The answer which you read me from the same proceeding at page 1240:

"Mr. Ross: I happened to be in New York when that was received and forwarded to me; and I consulted Mr. Nolan, our counsel, who again stated to me that that form of a biscuit had been patented, and that the patent had expired and been dedicated to the public; and that we had an unquestionable right to make a biscuit in that form, and advised me to reply to the Shredded Wheat Company in the form I did reply in May, 1915."

Does not refresh my recollection at all. Yet, undoubtedly, it was the truth. My recollection was we did not reply.

The biscuit we undertook to and did manufacture at that time was of substantially the same size and appearance as the shredded wheat biscuit made by the Shredded Wheat Company, but it was a little larger and a little heavier. My recollection is that the ten biscuit we had in the package weighed the same as the twelve they put in theirs. It differed in appearance, in that it was rounded at the bottom and browned on the bottom; whereas the shredded wheat made by the Shredded Wheat Company at Niagara Falls was flat on the bottom. Our biscuit was toasted on both top and bottom. I think it got its additional weight by additional thickness. It was practically the same length, but I think it had more wheat in it for the same size.

After this letter, which I testified in a former proceeding I received and answered, I continued with my preparations and did actually start operations, after which this action was brought by the Shredded Wheat Company against a distributor, the Humphrey Cornell Company, in Connecticut. The Ross Food Company was, I think, originally a defendant in the action, but were dismissed because lack of jurisdiction. Ross Food Company and their attorney did defend the case, and the expense thereof was borne by the Ross Food Company. When I testified the Shredded Wheat Company bribed one of the New York Central freight employees, that was not a matter of hearsay. I did not see them pay the bribe, but I heard witnesses testify to that. I was not present. I know the Shredded Wheat Company authorized that. paid the bill, I know. That came out in the testimony. I do not remember that very distinctly or any of this very definitely. That is a long time ago. At any rate, the outcome of that suit was an injunction in favor of the Shredded Wheat Company; and the Ross Food Company took an appeal on it to the Circuit Court of Appeals; which resulted in a decree of modification, as

evidenced by Judge Hand's opinion; and the decree of Judge Thomas was modified and reversed, if I read it correctly. What was left of it was that we were to try to market the biscuits to the consumers out of the cartons. That is all. Looking at the photostatic copy of the decree, I notice the dosing words: As so modified, the decree is affirmed without costs. I have a feeling, however, that those closing words are not in conformity with the rest of the opinion. If Judge Thomas' decree says there is a judgment for costs against Humphrey Cornell Company, \$623.90, it did. I do not remember. I suspect that judgment was never paid, but I do not know. It is a fact that, shortly after the affirmance of the decree, the Ross Food Company ceased doing business.

(A certified copy of resettled final decree in the U.S. District Court for Connecticut in The Shredded Wheat Company against Humphrey Cornell Company and Frederick H. Towne was marked "Plaintiff's Exhibit 237.")

(A certified copy of mandate of the United States Circuit Court of Appeals was marked "Defendant's Exhibit 126.")

THE WITNESS: As I testified, I attributed the final cessation of our business to the litigation. It was not also in part due to the product not being generally accepted by the public; quite the contrary. It is not a fact that it may have been due, in whole or in part, to the deficient working capital of the Ross Company.

We had a cash capital of approximately a hundred thousand dollars paid in, not entirely expended in the plant, some of it in the promotion of the business. I think we had about fifty-eight thousand in plant and equipment and the remainder, which would be about forty thousand, as working capital.

After that suit had been brought and while it was pending, a proceeding was started by the Federal Trade Commission against the Shredded Wheat Company for unfair competition, it being alleged that it Sinterfered with the production of machinery and rolls for the Boss Food Company. I think that complaint was issued as the result of our remesentations; but I am not entirely clear on how that or ginated. Such a proceeding was brought. They would start a little and then go to sleep for six or seven months, and then start all over again. That went on for two or threa years, for a long time after the Humphrey Cornell case had been decided and was out of the way. Testimony of both John L. and W. K. Kellogg was taken at Battle Creek; also of Ellis Howland and many other witnesses. I testified. I do not recall whether Mr. Valentine testified. Many witnesses were examined. and many pages of testimony were taken. Ultimately, in 1920, the Commission dismissed that complaint, as I recollect. That was the final outcome of that. I think my connection with the shredded wheat business came to an end before that. I was starving to death by that time. About 1918, I joined the Armour Grain Company in a tentative way. I worked for them by the day. Then I still came to Batavia and worked. That continued about a year. Then I joined the Armour Grain Company and worked for them exclusively.

As I testified, we had difficulty in obtaining rolls from Brown & Sharpe, of Providence. When I called on them, they told me they had a contract arrangement with the Shredded Wheat Company that they could not furnish rolls to others. I was informed they had a contract with the Shredded Wheat Company, under which they would furnish rolls to no one else.

In selecting the particular size and shape of biscuit to manufacture, I think I was influenced by Val-

entine, our engineer. He designed the rolls we used. He gave those specifications to Brown & Sharpe. I had a notion that, if we had longer rolls, we could turn out more shreds economically. He said there was a danger, if we made them wider, that the pressure would be so great the rolls would heat, and that was as wide as was practicable. Having shorter or narrower

rolls would run into expense.

I do not recall testifying in the Humphrey Cornell case that the cost of a shorter biscuit, substantially square in plan, would be twenty-one cents a case greater than the present size and shape; but unquestionably it would be greater, to make a smaller biscuit than that made by the Shredded Wheat Company. If you narrow the rolls, you get less production and make it more expensive. I know the Kellogg Company today is making a shorter biscuit and selling it in competition with Shredded Wheat. I do not know their prices. I do not know that they are selling it in practically all parts of the country at a less price per dozen cases than shredded wheat. I know that, weight for weight, it would cost them more to produce it. I base that on the perfectly obvious proposition that, if you narrow those rolls, you get less production out of The less production you get, the higher your cost. You can have two sets of rolls, and then you have two sets of motors and of power and of operators. You add to your expense the moment you cut down the size.

It is a fact that the Kellogg Company is making a shorter biscuit and competing with shredded wheat. I know nothing about the costs of making the Kellogg biscuit.

Referring to our carton, Defendant's Exhibit 91, the words immediately below the picture or representation of the biscuit on a blue panel, Manufactured by the Ross Food Company, Inc., Batavia, N. Y., U. S. A., that was always on that carton. No change was made after the decision of the Circuit Court of Appeals. The Court had it before then when they made that decision.

That picture was taken from one of the Ross Food Company's biscuit. We made a single set of rolls, cooked the wheat in a wash boiler, and shredded it on the set of rolls, put it in a pan, got a biscuit, and baked it in a little gas oven, such as you can buy in any ordinary hardware store. We made some model biscuits. I made thousands of them, sent some to our carton makers, and they used them. That was before we had a factory equipped with machinery. The biscuit produced by our factory after it was equipped were very much like the model biscuit I have just described making. I cannot tell you the dimensions of the rolls. They were designed by Valentine, who had been in the employ of the Shredded Wheat Company and also the Kellogg Company. He was a mechanical man and had made some inventions with regard to shredded wheat, which the Kellogg Company afterward acquired. After he joined the Kellogg Company, he produced rolls both of which had grooves.

I cannot tell you the dimensions or depth of the shredded wheat grooves, and I do not know the size of the shreds. There was testimony showing how they differed from those of the Shredded Wheat Company, but I do not recall how they differed. I think there was a substantial difference in the depth of grooves, which would affect the size of the shreds. They delivered a substantially larger shred. The biscuit, when completed, looked substantially like the old shredded wheat biscuit, except for the differences I have described.

Throughout all the history of the Ross Food Company we have gone over, the National Biscuit Company was never in the picture in any way at all. I assume they had no interest in shredded wheat until about 1930, when they made, I understand, a purchase of the entire plant. Prior to that time, they were not in the picture in any way. I have no grievance against them. On the contrary, I have the friendliest feeling toward the National Biscuit Company.

I remember a man named Ford, the original patentee of most of the shredded wheat machinery. I did not know him, but I knew of him. He lived out Watertown way, I believe. I do not remember ever seeing him or of his being on the stand in the Federal Trade Commission proceeding. I think I was present during practically all of it, but I never knew him. I did not even know he is now dead.

Defendant's Exhibit 91 is the only kind of package the Ross Food Company ever used, except a sample package which was a miniature imitation of or facsimile of the larger package on one side, and the other side had a message to the women folks to whom it was delivered. There was no room on the smaller package for all the reading matter on the side panel here.

RE-DIRECT EXAMINATION.

THE WITNESS: As we got on production basis in August or September of 1915, of the Ross Food Company biscuit, we cleaned the wheat with wheat-cleaning machinery and cooked it in a closed steam retort under pressure. We felt that was a better process of cooking than that used by the Shredded Wheat Company. As a result, the taste of the wheat remained. We introduced it to the shredding machines, which shredded it and delivered it to the pans, which formed the biscuits. The pans traveled automatically to the oven and automatically through the oven, for about forty minutes, and they came out browned top and

bottom. It was a traveling oven, and the Shredded Wheat Company, I believe, used a reel oven. The traveling oven principle enabled us to brown the bottom, whereas theirs was whit. After they left the oven, they were moist in the center. We dried them out in a chamber, and they then went to the packing tables.

Judge Thomas issued a very sweeping injunction against the biscuit in the large carton as well as the biscuit itself. The operation of that injunction was not stayed pending the appeal. As I recall, it was kept in effect. Our business must have been suspended from the time the injunction issued. My recollection is that nothing was done to suspend the operation of the injunction.

By the time the Court of Appeals held that, as to more than 90 per cent. of our business contained in the cartons, I should be allowed to do business, our business was practically rained. We were not able to

resume. My capital was exhausted.

The Kellogg's Toasted Wheat Biscuit, such as was marketed in a carton like Defendant's Exhibit 123, was a flavored biscuit. It was, otherwise, like Shredded Wheat, made out of wheat grains. In order to introduce the flavor into the wheat, we broke it up into a very coarse flour, in granual form, then made it into dough and introduced the flavor in making the dough, baked large loaves of tread, broke them into crumbs, and shredded the crumbs, after tempering it, holding a large batch of it in a bin and letting it stand for a period so the moisture in it would spread itself evenly over the whole mass. So Toasted Biscuit was both a wheat biscuit and a dough biscuit, put into the final form of flat shredded biscuit.

I think the threatening of the trade by the Shredded Wheat Company was the most damaging

thing to us in a business way, aside from the injunction. I knew about Mr. Perky's efforts to shred other products and heard he was going to shred turkey and spinach and carrots. The first organization was the Cereal Machine Company. Mr. Perky's idea was to sell machines, so a housewife would have a shredding machine in her house and would shred most of the things she was using, turkey, chicken, vegetables, wheat and That was the general idea, shredded everything. wheat, shredded cereals.

I was with the Kellogg Company when they first began to call their corn product Kellogg's Toasted Corn Flakes. When it first came out it was called Sanitas Toasted Corn Flakes, in 1906 or 1907. When I joined them in 1908 they were changing or had just changed to Kellogg's Toasted Corn Flakes. I am not clear on a period between those times when it was just called Toasted Corn Flakes. I do not recall that.

I counted the brands of corn flakes on the market at one time, and I should say there were a hundred and eight. I knew of some litigation by Kellogg's against the Quaker Oats Company, for putting out corn flakes. It was about the time the product was called Kellogg's Corn Flakes. My recollection is that the name Kellogg's was very small at first and then was gradually enlarged, until it rather dominated the package.

The production of Defendant's Exhibit 123 has refreshed my memory as to when Valentine joined us out there at Battle Creek, which I thought was around 1912. The fact this was marketed about 1910 at the beginning makes me now think it must have been then or prior to that when Valentine joined us.

RE-CROSS-EXAMINATION.

THE WITNESS: According to our process, after the wheat went through the rolls, it came out in long threads or strings and was fed directly into pans.

There was a beit that carried the pans that formed the biscuit. The biscuit traveled underneath a gang of shredders in pans. I think there were twenty-eight in a gang. The pans traveling underneath caught the filaments that came from the shredders or rolls. There was a knife at the end that cut the biscuit. The width of the pans determined the length of the biscuit, and the spacing of the knives or the cutter would determine its width.

There was a slight difference in width and length, too, I think, between our biscuit and those dimensions used for the biscuit of the Shredded Wheat Company. At any rate, it resulted in our getting a heavier biscuit and getting ten biscuit to the package instead of twelve, with the same weight to the package.

RE-DIRECT EXAMINATION.

THE WITNESS: There was no reason for that. We intended ultimately to cut down the weight and deliver about ten ounces of product to the consumer for ten cents. We thought ten cents' worth was a more acceptable quantity to the consumer than twelve cents' worth.

RE-CROSS-EXAMINATION.

THE WITNESS: Our carton had ten biscuit to the carton and twelve ounces. The carton says ten ounces, because you must not overstate weight, but you can understate it. I mean the actual weight was twelve ounces. You can prepare this biscuit, shipping some to Atlantic City and some of the same product to Denver. You will find the weight is quite different on arrival. Our idea was to deliver ten ounces for ten cents, just the same as shredded wheat biscuit, twelve biscuit, twelve ounces.

RE-DIRECT EXAMINATION.

THE WITNESS: I am appearing here under subports today.

PLAINTIFE'S PROOF IN REBUTTAL.

EARL P. WEBSTER. DIRECT EXAMINATION.

THE WYTNESS: I am a mechanical engineer, employed by National Biscuit Company, at Niagara Falls, N. Y., in connection with the Shredded Wheat Bakery -the manufacturing of Shredded Wheat. Prior to being employed by National Biscuit Company, I was research engineer for the Shredded Wheat Company. and have been connected with the latter company since 1916. I have a New York State professional engineer's license, and my work with both companies has been largely mechanical in the way of research work and mechanical equipment. From 1930 on I have been practically in constant connection with the production in the way of research on all processes including manufacture and processing of the biscuit as well as the machinery itself. I have had actual experience manufacturing Shredded Wheat and have operated ovens and machinery in production.

Yesterday, at our counsel's request, I conducted some experimental baking of Shredded Wheat, and I produce the results of what I did. The first carton which you show me is a carton of double Shredded Biscuit made on our regular equipment. The product was taken from one shredder and put back through another shredder, reshredded. In making this biscuit the equipment was operated in the very same way it is usually operated for our standard product with the exception that when the biscuits were panned, the green biscuits were returned back to the shredder and fed back through the hoppers again and reshredded. We used 26 hoppers, the first shredding, and down to 22 when we reshredded it. All of the unbaked shreds

were picked up and put through the shredders the second time. None of it was reprocessed more than once. After that they were carried right on through the oven in the normal way, the same temperatures and the same length of time and also were evaporated the same. Our regular machinery, shredder, ovens and evaporators were used for this purpose. All of the biscuit in the package now produced were made yesterday in the manner I have just described and, in my opinion, are merchantable biscuit.

(Package received in evidence and marked "Plaintiff's Exhibit No. 266.")

I now produce a package containing biscuit, made the same as in a previous exhibit, double shredded, the difference being in the time of bake and temperature. These biscuits were baked at a temperature of 400 degrees for 90 minutes. They were baked in an oven constituting part of the regular equipment of the company, and in other respects were reprocessed in the same manner as the exhibit previously introduced. It is not necessary to put these through the evaporator. We intended to but it was not required because they were fully baked right straight through and practically charred. The biscuit in this exhibit are just as they came out of the oven after an hour and a half of baking. Ordinary baking time is 18 minutes.

Mr. VILAS: If your Honor please, one of the defendant's witnesses produced biscuit that had been baked I think an hour and a half in their ovens.

THE COURT: That is not what I asked. I asked what variation this was from the normal baking by the plaintiff.

Mr. VILAS: I asked him that and he said that the normal time was 18 minutes.

THE WITNESS: Yes, and this is 90 minutes.

When these biscuit came from the shredding rolls, they contained approximately 47 per cent. of moisture. When the biscuit came out of the oven, after an hour and a half's baking, they were bone dry. These biscuit are absolutely not a merchantable product.

(Received in evidence and marked "Plaintiff's Exhibit No. 267.")

THE WITNESS: This was done yesterday at the same time as the other. I now produce a biscuit made on the same equipment as the previous samples, and the difference is that the double shredding occurred only in the center of the biscuit for ten heads. There were 22 heads used, ten of them double shredding reprocessed, while the balance of twelve were divided up between the top and bottom of the machine so that they were the single processed or once through. This was baked in the regular run of temperature and time, and went through the evaporator in the regular way. These biscuits are merchantable and very good.

(Received in evidence and marked "Plaintiff's Exhibit No. 268.")

CROSS-EXAMINATION.

THE WITNESS: These biscuits in 267 and 268 were tested as to weight. They ran about the usual weight of our regular product, all three packages. There is no noticeable variation in the weight. They ran from 11.70 to over 12. I did not put the record down. I weighed them particularly to bring cartons that were within our limit, our variations. There were not any of them that were packed that would not be allowable. We tested them as we usually do, and they are perfectly shippable and will ship and carry, and that is the only test and appearance. Forty-seven per cent. is

the normal moisture content. I would not say that you cannot distinguish these biscuit from the normal single processed biscuit. They are a different looking product. I think they are dressed up a little more and are neater looking in their finish. They are not better than the regular run. They are a little smoother looking, a matter of appearance, and that is attributable to the double shredding. In other words, double shredding gave it a little smoother appearance. would break to the various ingredients a little more thoroughly than single shredding, but the difference would be very readily distinguishable under a magnifying glass. In the single run biscuit the bran would appear a little larger; and in the double run the bran and gluten would be mixed up. That would not make a stickier biscuit. You would not know the difference if you shut your eyes and held both in your hand. They are a good product and as good as our single run biscuit. Our standard biscuit is a single run, with the exception of the scrap which we feed back, and which amounts to probably 1 per cent.

Our standard run of biscuit carry about 50 per cent. Durum. Not being a chemist, I could not go into the difference caused by the presence of Durum wheat; I can only tell you what the appearance is. Durum is a wheat with a color of a slightly different appearance. It is a little more toward the red. It is a hard wheat, not exactly what you would call a hard winter wheat.

Our normal practice in baking is to leave them in the oven 18 minutes. I know nothing about the practice in the defendant's plant. From the statement that the defendant uses 45 minutes for baking, it would indicate that you had lower temperature. Our temperatures run from 500 to 550 degrees. Our lower practical temperature would be not under 480 degrees, and a maximum around 550. None of the wheat in these two bis-

cuits went through the rolls more than twice. Assuming that the Shredded Wheat came from the rolls with the moisture content around 40, instead of 47, and was subjected to 500 degrees of heat in the oven for 90 minutes after double-shredding, it would have been charcoal at our temperatures. Forty-seven degrees is the normal moisture of our Shredded Wheat. If it ran to 49, it would come out of the baking oven with a little greater content of moisture and would have to be evaporated a little longer. At the shredding rolls, there is a limit that you must keep within as to moisture. We try to keep within 46 or 47 per cent. The wheat at the rolls is at atmospheric temperature. We never run any wheat through at a moisture content of around 40. It would probably result in a short shred being too dry. The lowering of the moisture content would reduce the tensile strength of the shred as it comes from the rolls. so it would break of its own weight.

RE-DIRECT EXAMINATION.

THE WITNESS: We used a temperature of 500 degrees in the oven on certain of the biscuit; and, on the second package which I produced, the temperature was 400 degrees. I have nothing to do with the purchase of wheat for the Shredded Wheat Company:

RE-CROSS-EXAMINATION.

In the two samples, first and second samples produced by me, there was a variation in temperature of 100 degrees.

(Witness excused.)

MR. COOPER: A few miscellaneous exhibits I would like to offer in evidence that have been marked for identification at one time or another. There was a book of photographs marked for identification in connection with the examination of Dr. Oakes, that illustrated the

plaintiff's mechanism, which was known as Exhibit A for identification, and I am offering that in evidence.

(Received in evidence and marked "Plaintiff's Exhibits Nos. 266, 267, 268, and 269," respectively.)

Mr. Cooper: Then there was a lady, Mrs. Burns, called by the defendant. In cross-examination a carton was identified by her and was marked for identification as Exhibit E, and I want to offer that.

(Received in evidence and marked "Plaintiff's Exhibit No. 270.")

Mr. Cooper: Then there was an Exhibit F for Identification that I want to offer in evidence, a carton of the Kellogg product.

(Received in evidence and marked "Plaintiff's Exhibit No. 271.")

Mr. Cooper: Then Plaintiff's Exhibit G for Identification, that was identified on cross-examination of Mr. Kellogg.

(Received in evidence and marked "Plaintiff's Exhibit No. 272.")

Mr. Cooper: Then there was for identification Plaintiff's Exhibit 261, another carton identified on the cross-examination of Mr. Kellogg, and I will offer that in evidence.

(Pecelved in evidence and marked "Plaintiff's Exhibit No. 261.")

Mr. Cooper: Plaintiff's Exhibit for Identification No. 263 was a report of an investigation by the Curtis Publishing Company, which was identified on cross-examination of Mr. Jordan.

THE COURT: The tender on behalf of the plaintiff of the publication of the Cyrus Curtis Publishing Company is excluded. It is violating all of the well-known rules of the admissibility of evidence.

Mr. Cooper: May I have it preserved as an exhibit under Rule 46?

THE COURT: Oh, I think so.

(Received in evidence and marked "Plaintiff's Exhibit A under Rule 46.")

Now, if your Honor please, in the examination of Dr. Oakes, there were introduced as exhibits, Plaintiff's Exhibits 240 to 245, inclusive, those various shapes of biscuit that he testified about, and I have had those photographed, and the photographs bear the mark of the exhibit number to identify them, and I should like to offer as exhibits, which might be marked 240-A to 245-A, photographs of those several different kinds of biscuits.

MR. CLARKE: I have no objection to their going in as photographs of those exhibits, subject to any correction, if any should develop. We are not accepting them in place of the physical exhibits.

Mr. Cooper: Not at all. Between mice and moth and rust, those exhibits might disappear, but the photographs will not.

(Received in evidence and marked "Plaintiff's Exhibits Nos. 240-A to 245-A," inclusive.)

Mr. Cooper: There are exhibits attached to the interrogatories as Plaintiff's Exhibits 1 to 5, inclusive. I am not sure that they have been formally offered in evidence, and I should like to offer those in that order in which they are attached to the interrogatories.

(Received in evidence and marked "Plaintiff's Exhibits Nos. 1 to 5," inclusive.)

Mr. Cooper: My brother on the other side offered in evidence, among other patents belonging to the Natural Food Company or its successor, Shredded Wheat Company, a certain design patent No. 28,688, dated September 17, 1895. I want to offer in evidence an opinion of Judge Kohlstaat and a decree in a suit between the Natural Food Company and Bulkley and others, whereby he declared that patent to be invalid.

THE COURT: This is a hearing for the purpose of hearing witnesses and taking proof. Now, I think that is clearly proper within the ruling heretofore made, and it is excluded.

Mr. Coorer: Then I will have, in order to preserve my rights, if I may—I will have to offer both the opinion and the decree under Rule 46. That is all I can do to save my place in the Court of Appeals on the point.

(Received in evidence and marked "Plaintiff's Exhibits B and C, Under Rule 46.")

THE COURT: You have tendered a decree, as well as an opinion?

Mr. Cooper Yes, sir.

THE COURT: My decision is to rule the decree in and exclude the opinion, so I desire to continue that ruling here.

MR. COOPER: Then I will re-offer the decree as evidence. This exhibit, as I understand, is evidence in the case.

THE COURT: It is.

(Received in evidence and marked "Plaintiff's Exhibit No. 273.")

Mr. Cooper: Your Honor has ruled out the opinion, and I take an exception on that, and offer the opinion under Rule 46.

Mr. CLARKE: Would your Honor permit me to re-offer the transcript in the Williams-Natural Food case, to come under the same ruling?

THE COURT: Transcript of what?

Mr. CLARKE: In the case of Williams v .---

THE COURT: Transcript of the testimony?

Mr. CLARKE: No, the transcript—I will just offer the transcript of the pleadings from that case. I will not make the offer of the testimony itself.

Mr. Cooper: I am not offering the pleadings here or any part of it.

THE COURT: Do you desire to put in under Rule 46?

MR. CLARKE: Yes, I make the offer of the pleadings—that is, the application and opposition of all of the proceedings in the Patent Office, except the testimony.

THE COURT: I shall not vary the ruling heretofore made. You are permitted to introduce the record that you offer under Rule 46.

(Received in evidence and marked "Defendant's Exhibit A, Under Rule 46.")

EARLE T. OAKES (Recalled).

Testified in rebuttal as follows:

DIRECT EXAMINATION.

THE WITNESS: Upon the assumption that there was a 27 per cent. scrap re-worked or re-processed, the additional cost would be less than one per cent. of a re-

processed shred. I know this because I was production manager for Shredded Wheat Bakeries for nearly four years, and my work there required that I know every fraction of per cent. of cost from the start to the finish

of the production.

In the actual operation of the plaintiff's process, if there is any stretch of the shreds or filaments in the production of Shredded Wheat, it is very slight. In most of our machines there is none at all. As the shreds drop from the roll to the accumulator belt, it might happen that a few of the shreds were stretched. Our belt is geared to run at the same speed at which the shreds are delivered from the roll, so that in the regular production there is no stretch; but I can conceive that two might be caught and stretched, but not in our production. It is not planned that way—does not operate that way.

Speaking from my experience as a biscuit man for many years, if we were to start production of Shredded Wheat Biscuit of exactly the same character that the plaintiff produces now and were required to build the most advantageous type of machinery for that production, I do not believe we would use this same kind of machinery which we are now using and which we bought from the Shredded Wheat Company. We would Lase it more on the accustomed machinery for the biscuit baking industry. Throughout the biscuit industry the material is laid on canvas or felt aprons, and the cutting is done by a head operating through the material above the apron itself, over a cutting bed, which leaves the material on an apron which can be conveyed along and deposited on pans later on. It leads to greater capacity and an easier way of handling the material and a greater variety of forms of product throughout.

With that type of machinery, the plaintiff produces a great variety of forms of biscuits. I should say that of around 500 varieties, two-thirds to three-quarters of them would be much more fragile than the Shredded Wheat Biscuit. The most prominent of these would be Uneeda Biscuit which we manufacture around a half a million cartons a day, and that is much more fragile. All of our chocolate goo... and all of our marshmallow varieties and most of our sugar wafer varieties. In the marshmallow variety there is a base cake that is baked and the marshmallow deposited on top of it, and that might be either dusted with cocoanut or chocolate or have a nut placed on top of it. The base cake itself is fragile, but at the time of baking, but then it softens up from the marshmallow and the marshmallow cannot be touched without harming the biscuit itself and many of our marshmallow varieties are iced with a water icing which is extremely fragile and cannot safely be handled without breaking the icing itself or cracking it.

Uneeda Biscuit is a soda cracker, square with the corners clipped. We make many varieties of soda crackers and butter crackers as fragile as Shredded Wheat Biscuit. We do not use the same shape cartons for all products. They may be square or rectangular, round, or various shapes. We pack a great many round biscuits in square or rectangular packages. We do have round containers for many of our products and for some of our leading lines. The grocers take them and put them on their shelves for retail. These cartons are of pasteboard as well as of tin. I do not recall any round varieties that we are using pasteboard on now. There are many of them of tin that we have used, and I have a doubt that we are using now round pasteboard variety.

In connection with our cracker cartons, we use transparent wax paper. The carton which you now show me, called "Champion Flake Butters" with a carton encased in wax paper, is one of our regular products, and the wax paper is such as is used on other varieties of products beside that and is waterproof and transparent so that the lettering on the cartons may be read underneath as it is on this package.

(Received in evidence and marked "Plaintiff's Exhibit No. 274.")

The Witness: In my opinion, various forms of biscuits and crackers could be produced and packaged as advantageously from the manufacturing point of view with respect to cost and appearance as the pillow form of the plaintiff's and defendant's Shredded Wheat here in issue.

With respect to the present regular machinery purchased from the Shredded Wheat Company, if the five or six center grooves in the grooved roller of the last pair of rolls in the shredding machine were omitted, you would get a band of wheat rolled out in ribbon form about one-quarter of an inch wide. The same thing could be done on the defendant's apparatus testified to here.

In Defendant's Exhibit 198, the green tint on the inside of the paper comes in contact with the contents of the box. I cannot see that there is any great difference from a saritary standpoint between the defendant's present Shredded Wheat cartons with the green tint on the inside and the parts of the plaintiff's paper cartons and separators that touch the biscuit. In the sense that the paper is dyed, the green coloring on the inside of defendant's carton is a foreign substance. The plaintiff has, to my knowledge, used corrugated separators in marketing its product for fourteen years. The defendant's corrugated separator is made of what is known as sulphite pulp, and I would be willing to take their word for it. Sulphite pulp usually has newsprint in it, as a regular part of the manufacture. The paper composing plaintiff's separators that are shown

on Exhibit 215 is sterile when it comes from the paper machine. We make no effort to keep it sterile except that we keep it clean. It is impossible to keep anything sterile out in the atmosphere. It is a matter of sanitation rather than sterility. We practice great care in the matter of sanitation, both containers and goods.

Besides round crackers, the National Biscuit Company produces other shapes, such as heart shape, irregular outlines, scalloped, triangles in cake. Among the irregular shapes, the company produces pretzels in large quantities in package and in bulk. We have a rectangular package for the odd shaped pretzels which are very fragile. Great care has to be taken in production and packaging against loss.

CROSS-EXAMINATION.

The Witness: A pretzel will weigh from forty to the pound up to two or three hundred to the pound. We have no ounce or ounce and a quarter pretzels but we have some that come very close to it. On the round cardboard cartons I spoke of, the weight varies from eight ounces up to maybe two pounds. A product in round cardboard cartons that weighs two pounds would be cake, and these are packed by the case or by the bundle. We ship those round cakes up to two pounds in cases, six or twelve cakes to the package, packed one on top of the other, and also side by side. These cases will run in weight from six to twelve pounds. Sometimes there is packing around the edges of the case. I think those cases would be marked "handle with care."

The plaintiff has never used cushion partitions in regard to Shredded Wheat. I have been with the Shredded Wheat bakery since February, 1929, about four years. I spoke of trouble with the operators running ribbon threads through the middle of the biscuit.

I thought they were trying to make uniform biscuit, and that did not make uniform biscuit. It made a ribbon through the middle of the biscuit. Radiant heat would pass through the interstices between shreds in a different way from what it would pass through a solid ribbon. We never ran any biscuit with an external ribbon on them except accidentally. The plaintiff has never conducted any experiments that I know of in the way of marking its own biscuit. I never had any instructions to experiment on anything of that sort and never had any personal experience with it of any kind. I am quite sure that round cartons are still used for cakes by the plaintiff company. Very often crackers and cookies are displayed right in the same shelf department with breakfast cereals. Very often they are separated from them. We try to get our cereals in with crackers and cookies, if we could, so does everybody else.

With respect to the two biscuit, plaintiff's and defendant's, I would not assume, that the smaller biscuit was any less fragile than the larger biscuit. I do not think fragility has got anything to do with the size. I do not think Uneeda Biscuit cartons are marked handle with care. I am not certain about that. I would say that those biscuits in the glass globe, Plaintiff's Exhibit 36 might be described as being in a consider-

able condition of dilapidation.

I have never designed any machinery for the manufacture of Shredded Wheat. I am not a machine engineer. At the present time, I am visiting the factory about once a month, although I have no definite system that I intend to follow. The actual production work in the factory is wholly in charge of the men there. I have been up there in order to correct something that went wrong with the machinery in the nature of a breakdown. The fact is that I am notified of the situation in Niagara Falls. If there is anything unusual, I am

notified and they ask me to come up. If I think I can be of use to them and I am not asked I go up without any set rule or procedure or anything else. It is decided on the nature of the occasion. I am a chemist by profession, and about half my working time is now taken up in the laboratory in New York City on West Fourteenth Street and the rest of it as a desk man in the executive offices of the production department. There is an experimental food laboratory at Niagara Falls in charge of Mr. Hadden; it is much smaller than the one in New York, and is devoted entirely to Shredded Wheat and Triscuit. Mr. Hadden is manager of the bakery at Nisgara Falls, and I do not think he maintains anyone in the laboratory all of the time. It is a purely physical baking laboratory and not chemical. It is not technical but experimental. In our laboratories in New York, they are engaged on other products beside Shredded Wheat and Triscuit, that would be general cracker line. Yes, there is more work on the National line, their line outside of Shredded Wheat, than there is on Shredded Wheat. I know nothing about the actual practical conditions in the Kellogg plant at Battle Creek, except as you have described. I have never been in their Shredded Wheat plant and have no idea as to the amount of help along the line of production of defendant's Shredded Wheat Biscuit. My only idea is based on your description of your process; and I should say that you probably have one man cooking wheat, and one or two men attending the shredders, and probably a couple of men on the oven, maybe three or four. You possibly have fourteen to twenty girls packing biscuit. That is my surmise based on what was said about the making of the defendant's product. We have, in making Shredded Wheat, run accumulator belt at a rate of speed to produce a stretch on the shred, but we no longer follow

that practice. We have not always made the product of the mixture of Durum and white wheat. I testified the other day that we did not always do that. Sometimes we run on pure white winter and sometimes it is a mixture and the mixture may be from nothing up to 50 per cent. There have been occasions when our wet scrap ran higher than one per cent., but it has always gone into reprocessing. Yesterday we used 100 per

cent., reprocessed.

Each down spout is in the nature of a sleeve that slips up by and telescopes so that each head can be freed by atelescoping of the down spout together. I think we probably had machines that have only one hinged down spout, but I think most of them have two or more because we always want one that can be hinged and thrown back and if that particular one happens to be in the process of changing the rolls, we would not say exactly how many we have. We have one or more on each machine that is hinged. And these hinged heads permit the introduction of wet scrap without telescoping the whole head. We very often feed the reprocessing scrap in on top. The hinged heads would probably be toward the middle of the machine. Very often for hours at a time we feed in the green scrap on top of the biscuit. It is a matter of convenience to a certain extent. If it is more convenient to feed it in on top, we do that; and if the center head is operating in good shape, we will take it back to the center of the machine.

These rolls wear as time goes on and bearings wear and get hot, and sometimes we have to take a head down and renew the bearings, and sometimes we have to renew the rolls themselves, and sometimes we have to remove an obstruction from a pair of rolls, and sometimes we have to clean out oil holes so that the bearings can get proper lubrication. So that if the

rolls were under repair, we would not feed any wheat . in. We would usually put green scrap in if the head was operating properly. But it is fair to say that if the rolls which have the binged heads are operating at all, and receiving wheat to be shredded, then we would feed the green scrap through the hinged head; and the only time we telescope the other head is when either or both of these hinged heads are out of order. In the plaintiff's biscuit that are baked on the bottom as well as on the top, they are baked about two minutes less and are evaporated about ten minutes less than the regular biscuit. It is a shorter process all the way through. The difference is that these biscuit are in individual pans, one row on a pan, and the oven is arranged entirely different and does the work in less time. The biscuit that are not browned on the bottom in our regular production are baked longer than these baked in the traveling oven. This does not make the regular line of biscuit any lighter on the top than those baked in the traveling oven.

I might explain the whole process a little more in detail. The regular biscuit, baked on the reel oven which you speak of, as 80 to 85 per cent. of our production, those are baked on a wire pan, a screen, and are placed on a solid shelf in the oven, so that the biscuit has a wire screen underneath it, and a solid steel shelf underneath it that swings around with the biscuit all the time that it is being baked. Eighteen minutes is the regular time for baking them at temperature. the fire goes down a little bit, we might have to give them another revolution in the oven. If by any chance the baker figures they are not quite finished and gives them another turn, that might brown some of the biscuit considerably more than our regular production. In other words, we have got a leew y of three turns in the oven, and if you take them but when they are just brown, you can give them another turn, when they will be thoroughly well browned, and still another turn, when they will be bording on the dark side, and another turn will give you a very dark biscuit on the top; but browning on the bottom has nothing at all to do with browning on top. I do not think there is any great difference other than to be brought about by the construction of the oven.

With reference to my statement that with 27 per cent. wet scrap to be reprocessed, there would be an increase in production cost of 1 per cent., I am speaking of our bakery now. The only additional cost in our case would be the incidental cost price of driving a conveyor that would carry that 29 per cent. back into the machine itself for reshredding, and the cost of driving the machine itself for reshredding 25 per cent. more, we would have merely a 25 per cent. increase in the power cost of driving the shredding machine itself, and the equipment recessary to carry the shreds back in there would be on less material and on less production. Our shredder is not the bottle neck for our operation, so that it is merely a question of how much it costs us to convey that back and reshred it.

The cost of making biscuit is made up first of the cost of the wheat, and then the cost of warehousing that wheat, and the cost of cleaning it, and the cost of cooking; and it is all automatically conveyed from one place to another, so that there is no handling of this in any part of it; and the cost of the power of running the shredder. and the upkeep on the shredder. The total cost of shredding is less than 1 per cent.; so that if we had to reshred or if we had to double our shredding cost, it would not add more than 1 per cent. to our total cost of operation. I do not know about the Kellogg machine. We can increase the speed of our own machine. We have not reached the limit of speed in our shredding equipment. We have reached

the limit of our beking capacity in our oven. If we speed our shredders up, we cannot take care of it without putting in more ovens, which we do not do; but if we had to reprocess 27 per cent. of this instead of cutting our production 27 per cent., we would increase the speed of our shredder 27 per cent., which we know is possible, and get the same output as this 27 per cent, increase as we have now in our present speed. There is no more labor attached to it. We would use the same number of ovens for the same production. There is not any more material going to the oven. If you speed your machine up 27 per cent, and take 27 per cent, of it away from the oven, you would only get the same original amount going to the oven, so that there is no occasion for building more ovens. It is exactly as if you have one hundred men carrying a pile of sand from this end of the room to the other. and each man carries a bucket an hour. If you have 127 men carrying each of them a bucket an hour to the other end of the room, and 27 of those men bring a bucket back with them, you only have 100 buckets left at the other end of the room each hour with 127 men except instead of having more men, we have more machinery or faster production of the machinery. In other words, we speed the machine up 27 per cent. It delivers per minute or per hour, 27 per cent, more material at the end of the machine, but 27 per cent. of that material goes back to the machine to be reprocessed, so that there is only the sam original amount that goes to the ovens for baking. I am afraid I have not made that clear, have I?

I have never seen a Kellogg Shredded Wheat plant, but I have seen the Corn Products end of it, going through as a visitor conducted by the regular guide. I did not make myself known to the officers of the company as I understood the plant was open the same as ours to any visitors that went through.

Some of the fragile crackers I have spoken about, made by National Biscuit Company, are packed by automatic machinery and some are packed by hand. In the case of Uneeda Biscuit, each pan comes down between two rows of girls and the crackers are in definite alignment as they come from the oven and the girl simply picks these up and makes a sack of them and slips them into the cartons.

RE-DIRECT EXAMINATION.

In an ordinary oven you cannot cook Shredded Wheat for an hour and a half at 400 degrees without charring or carbonizing the product. That is based upon my knowledge and experience with Shredded Wheat. If you have temperature high enough to toast, it will eventually carbonize and char black. I was in full charge of production of the Shredded Wheat factory for a little over three and a half years, and lived at Niagara Falls, and was in the factory every day.

(Witness excused.)

(Note: At this point, defendant's counselread a summary of some of the depositions taken by the defendant for use in the case. The same is here omitted as the depositions are completely summarized elsewhere in this record.)

Mr. VILAS: My friend will permit an interruption here in connection with Ross's deposition. I direct attention that there was offered the entire record on appeal in the Second Circuit case. In view of rulings that have been made during the progress of this trial, I think that that record should be stricken out, or that exhibit should be stricken out. I refer to Defendant's Exhibit No. 120 offered in connection with the direct examination of Ross of Defendant's Volume V, page 2832.

THE COURT: I think the deposition should conform to the ruling of the Court.

Mr. CLARKE: I may have an exception on that, if your Honor please.

THE COURT: Certainly. You already got the record in under the rule.

Mr. CLARKE: The record is marked for identification and I will reoffer that record under the rule.

THE COURT: Rule 46.

MR. CLARKE: Yes.

THE COURT: Very good.

ROSS T. ADAMS.

Becalled for the defendant in sur-rebuttal.

DIRECT EXAMINATION.

The Witness: Since the last hearing, I visted the offices of the duPont Company here in Wilmington and secured latest price information on cellophane, and I am prepared to give that. I have a current price list on cellophane both transparent, also moisture proof cellophane in small quantities and large quantities. The No. 300 moisture proof transparent cellophane, which the question was asked me this morning as to the price, is quoted in the duPont circular at 58 cents a pound, in lots of 500 pounds or over. I also have a specimen of this moisture proof cellophane as given me by the duPont organization. In order to effect the comparison between the cost of moisture proof cellophane and wax paper, I have prepared some figures.

The waxed paper used by the Kellogg Company as the inside liner on the Corn Flake, all bran, and

certain other cereal packages, sells at a certain price per pound and that price is five cents a pound. The wax paper is generally figured on a ream weight basis, in other words, 480 sheets, size 24 inches by 36 inches, constitutes a ream, and the weight of that ream is 33 pounds. In order to compute the area of the ream of paper in square inches, it will therefore be necessary to multiply the 36-inch dimension by 24 inches and then again multiply that figure by 240 sheets, which would give the total square inches of paper in a ream weighing 33 pounds. That computation figures 414, 720 square inches in a ream of paper weighing 33 pounds and the cost is five cents a pound, making the total cost of a ream of wax paper \$1.65.

The duPont moisture proof cellophane is priced at 58 cents a pound, and there are 19,500 square inches of moisture proof cellophane in a pound of cellophane. Therefore, dividing 19,500 square inches into the 58 cents which is a net pound price, we arrive at a figure of .0297 cents per thousand square inches of moisture

proof cellophane.

In order to arrive at the cost of 414,720 square inches of cellophane, which is the number of square inches in a ream of wax paper, which is normally used by the Kellogg Company, we multiply that figure 414,720 by the price per thousand square inches, which is .0297. The result is 12.31 for the cost of 414,720 square inches of moisture proof cellophane.

Going back to the cost of wax paper, which is \$1.65 per ream, we divide \$1.65 into \$12.31 and get a result of 7.4 times, which indicates that the cellophane costs 7.4 times as much as wax paper. This gives effect to the difference in thickness.

The various district sales offices of the defendant are charged more when they order Whole Wheat Biscuit in cellophane cartons than when they order in the ordinary cartons. The effect of that is to penalize those cellophane window packages as compared with the others.

These packages of National Biscuit, Uneeda Bakers Butter Thin Biscuit, Uneeda Graham Crackers, large National Biscuit Uneeda Biscuits, and Uneeda Bakers Premium Light Crackers, I purchased this noon in a store on Market Street. I did not find the words "Handle With Care" on any of them.

(The packages were received in evidence and marked respectively "Defendant's Exhibits Nos. 259, 260, 261 and 262.")

CROSS-EXAMINATION.

THE WITNESS: The leaflet to which you referred as having been received from the duPont Company shows on the first column of figures cut to size sheets. And No. 330 moisture proof and transparent is priced on a cut-to-size sheet in quantities of seven million square inches and up at 3.7 cents per thousand square inches. But when the same material is bought in stock size sheets in 6000 sheets and upwards approximately 40 inches wide and 40 inches long, its price per thousand square inches is 3.3 cents per thousand. I did no figuring on the basis of stock size sheets for my requirement for the reason that had I used stock size sheets, the price would have been somewhat higher than the figures that I figured. I figured the price of .0297 cents per thousand square inches based on roll stock, whereas the figure you have just given is .033, which is somewhat higher.

I asked the duPont Company for ton and carload prices and was advised that the price as indicated in the circular was the standard price and not subject to further discount for targer quantities. The No. 300 moisture proof cellophane is not as thick as the wax

paper which we use on our products. I cannot give you the difference but the wax paper is approximately 50 per cent. thicker than cellophane. I would say off-hand. I have computed the cost c the two papers, wax and cellophane, on a square inch basis. I think moisture proof cellophane is slightly more moisture proof than wax paper. I think cellophane of the thickness specified here gives a little more protection.

Mr. Cooper: If your Honor please, I have opened here in court one end of Defendant's Exhibit No. 259, which is the carton marked Butter Thin Wafer, which the witness said he bought today.

THE WITNESS: I observe that the top cracker or Butter Thin Wafer is broken in two. I did not subject this package to any rough handling after buying it.

(The price list from the duPont Company, produced by the witness, was received and marked "Plaintiff's Exhibit No. 275 for Identification.")

(Witness excused.)

RICHARD POOLE.

Recalled for the defendant in sur-rebuttal.

DIRECT EXAMINATION.

THE WITNESS: In the operation of our shredding machine and accumulator belt, which receives the shreds from the shredding rollers, we cannot speed up that accumulator belt or the relation between the accumulator belt and the shredding rolls, because they are going at maximum speed now. We have a variable speed on the belt which puts a slight stretch on the shreds, and we have tried from time to time to get in-

ereased speed for our shredding heads and on the belt, but we found that it is going at maximum speed now for the quality which the Kellogg Company demand.

CROSS-EXAMINATION.

THE WITNESS: The variable speed is connected with the traveling receiving chain or belt below to get the exact speed to take care of the shreds coming from the mills. We have tried from time to time to run at a higher speed, but had to go back to the speed that wehow rnn. We cannot run it faster and make the quality of biscuit that we have to make. Mechanically we could run it at higher speed, but we do not want to because we would get a diminution in quality. The shreds would be shorter and do not hold up. We find that it does not take the part the way it does when it is going the proper speed, and the quality in general is not as good as it is at the speed it is now running. Of course, if you break the shreds when they tend to come up, it makes a soft top biscuit, and is inferior. At the speed at which we operate the machine, we get a well puffed biscuit.

(Witness excused.)

WILLIAM P. PENTY.

Recalled for the defendant in sur-rebuttal.

DIRECT EXAMINATION.

THE WITNESS: We have tried reprocessing wet scrap over a period of years at different times in the experimental room with the uniform conclusion reached by the defendants that we would not reprocess scrap for the reasons that I have already stated that it did not make a practical biscuit.

The biscuit which we run through our ovens, represented by Defendant's Exhibit No. 198, was at a temperature of 400 degrees and they were there one hour and 30 minutes, along with our regular biscuits; and the oven was operated under regular, normal conditions with no deviation from the standard operating conditions. We left them in there as I stated until we tried to puff them and get a proper color, and it took one hour and 30 minutes.

Referring to Plaintiff's Exhibit 268, which is a standard large size of plaintiff's biscuit, and Exhibit 266, the carton containing a double-processed biscuit, the one that had been double-processed is much firmer and harder than the regular biscuit. The size where the cutting edge is, is harder than what it is on the double-processed one. The double-processed one is narrower in comparison to the other. The shreds on the double-processed biscuit welded here together instead of being more of a separate fluffy shred drawn in straighter lines.

The biscuit from Plaintiff's Exhibit 246 are practically the same as the biscuit from Plaintiff's Exhibit 268.

The degree of moisture in the defendant's biscuit as it comes normally from the shredding room to the accumulator belt is about 42 per cent., and the normal toasting time in the oven is 45 minutes at 400 degrees of heat. The evaporator temperature is 210 degrees, and the biscuits are run when passing through.

CHOSS-EXAMINATION.

XQ. 18. Now, is it your understanding that the biscuit 268—from the Exhibit 268 is one of the plaintiff's regular biscuits?

A. Apparently it looks identical, not quite as much puff.

XQ. 19. Is it your understanding that that is plaintiff's regular production?

A. It is my understanding that that was put through with 10 mills, but it was double-processed.

XQ. 20. You cannot find any difference between that and the plaintiff's regular biscuit, can you?

A. Only a slight difference in the puff.

XQ. 21. Now, I take a biscuit out of another package that I hold in my hand, which is an exhibit in this case, and I will ask you to compare that with the biscuit in Exhibit 268, and say whether the one that I handed you from the other box, not 268, is in your judgment the plaintiff's regular production?

A. With the exception of being broken off here,

as far as I know it is.

XQ. 22. You think the one I last handed you is the plaintiff's regular production?

A. As far as I know, sir. It is puffed more than this one. That is the only difference I see between the two before me.

XQ. 23. The one I took out is from Plaintiff's Exhibit 246.

Mr. CLARKE: The fact is that there is one of the regular run biscuits.

Mr. Cooper: I will stand on the record on that.

Mr. CLARKE: You mean by that that was one of the biscuits that was in Defendant's Exhibit 246, is that it?

Mr. Coorer: Yes, I took it off in your presence and in the presence of the Court from the carton No. 246.

THE COURT: Where it belongs?

Mr. Cooper: Where it belongs.

RE-DIRECT EXAMINATION.

There is a great deal of difference discernible between the biscuits taken from Plaintiff's 246 and the one from Plaintiff's 266 as to width. This is much harder and firmer than this one. The harder one is the 266, and the strands are straighter and very firm and hard while these are more fluffy and loose, and this shows the same effect on the bottom of the two biscuits. No. 245 and 268 have very little difference. The puffing on 266 is just a little less than the other one. Outside of that, they apparently look the same, the edges on 268 are just a little sharper and harder.

(Testimony closed.)

PLAINTIFF'S PROPOSED FINDINGS.

(Filed August 1, 1933.)

Plaintiff presents the following as its proposed findings of fact and conclusions of law to be made by the Court.

FINDINGS OF FACT.

1. Plaintiff, National Biscuit Company, is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, a citizen and in-, habitant of said State.

Defendant, Kellogg Company, is a corporation organized and existing under and by virtue of the laws of the State of Delaware and is a citizen and inhabitant of said State.

- 2. This Court has jurisdiction of the parties and of the subject of the suit which involves, exclusive of interest and costs, more than the sum of \$3,000.
- 3. Plaintiff is the owner by purchase in 1930 of the assets, going business trade-marks and all property of the Shredded Wheat Company, a New York corporation, the name of which was changed from Natural Food Company in 1908; that said Natural Food Company in or about 1900 succeeded to the going business, trade-marks and property of the Cereal Machine Company, a Colorado corporation, later known as the Shredded Wheat Company.

The said Cereal Machine Company was organized by one Henry D. Perky, who was the originator and inventor of the process of reducing cereals to filamentous or thread-like form and was the originator of the product made in distinctive form known by the trade-mark "Shredded Wheat" at or prior to the year 1892.

- 4. Plaintiff and its several said predecessors in interest have manufactured continuously since at least the year 1892 and have sold a biscuit in distinctive form which is described as pillow shaped and made from filaments or threads produced from whole wheat by the Perky process and which has been continuously and is now known throughout the United States, Canada and England as "Shredded Wheat" (sometimes applied as "Shredded Whole Wheat Biscuit").
- 5. From the year 1892 until the present time, plaintiff's said predecessor's and plaintiff have manufactured and sold said whole wheat biscuit in the same distinctive shape and appearance without material alteration or change.
- 6. The said biscuit so manufactured by plaintiff's predecessors and plaintiff has during all the said period, from 1892 to the present time, presented an appearance by which it was always recognized and readily distinguishable from any other form of food product on the market in the United States.
- 7. The biscuit of the manufacture and sale of plaintiff's predecessors and plaintiff has come to be and now is known to the trade and public by its distinctive design and appearance.
- 8. The said form, shape and color of the plaintiff's said biscuit have come through long and exclusive use and extensive advertisement to have the meaning and significance of the product and biscuit of the plaintiff only.
- 9. During all said period, except for the acts of the defendant and of one other company, the Ross Food Company, whose activities were enjoined in 1916, the plaintiff and its predecessors have been the sole manufacturer of whole wheat biscuit of such form, shape, color and character.

- 10. Plaintiff is vested with the exclusive right to manufacture and sell to the public in the United States such biscuit.
- 11. The said biscuit as so manufactured and sold by the plaintiff and its predecessors for more than forty years in such form, shape and color has become widely and universally known as the product of the plaintiff, and known to the public under the name of "Shredded Wheat", which said words were originally applied to said product by the plaintiff's predecessors.
- 12. The words "Shredded Wheat" have come through long and exclusive use upon the packages of said biscuit and in extensive advertisement thereof by the plaintiff and its predecessors to have the meaning and significance of the said biscuit product of the plaintiff only.
- 13. The defendant in the year 1922 manufactured and sold and designated by the name "Shredded Whole Wheat Biscuit" a biscuit manufactured by a process substantially the same as that of the plaintiff and exactly resembling the biscuit of the plaintiff with the single exception of size, and that defendant, upon notice from the plaintiff, ceased to manufacture said biscuit in October, 1922.
- 14. In the year 1927 defendant again began the manufacture and sale of a whole wheat biscuit made in imitation and simulation of the biscuit of the plaintiff as to form, shape, appearance and color, differing from the plaintiff's biscuit only in size, and the defendant sold and now sells its said biscuit as "Shredded Whole Wheat Biscuit" and/or "Shredded Wheat" in competition with the said biscuit of plaintiff.
- 15. Plaintiff is the owner of and vested with the exclusive right in and to the following trade-marks

which were duly registered in the United States Patent Office, to wit:

"Shredded Wheat", registered January 15, 1924, No. 178,725, for biscuit and crackers;

"Shredded Wheat", registered May 25, 1926, No. 213,456, for biscuits, crackers and cereal foods;

A picture of a dish with two whole wheat biscuit, registered August 17, 1926, No. 216,593, for biscuit, crackers and cereal foods.

- 16. All of said trade-marks, identified in paragraph numbered "15" hereof, have been used by the plaintiff in connection with the sale of its said biscuit for many years, and have been so associated with plaintiff's product that they have been and are indicative of source of origin in the plaintiff or its predecessor, the said trade-mark "Shredded Wheat" having been used since the year 1892.
- 17. The volume of sales of the plaintiff's said biscuit of distinctive design and appearance continuously increased from the year 1892 until 1928 when 2,521,751 cases were sold by plaintiff.
- 18. Both the plaintiff's and the defendant's biscuit reach the ultimate consumer in many instances, in restaurants, cafes, hospitals, institutions and homes, outside of and without the display of the package to the ultimate consumer.
- 19. The defendant has since 1927 used (in competition with the said biscuit of plaintiff) the expression "Shredded", "Shredded Whoat", "Shredded Whole Wheat", "Shredded Whole Wheat Biscuit" on its packages containing its whole wheat biscuit made in imitation of plaintiff's said biscuit of distinctive design and appearance and in its advertisements in connection with the sale of its said whole wheat biscuit.

- 20. The defendant has employed upon its cartons containing its whole wheat biscuit made in imitation of plaintiff's said biscuit of distinctive design and appearance and in its advertisement a picture of a dish with two of plaintiff's biscuit therein.
- 21 Defendant has shown representations of plaintiff's said biscuit of distinctive design and appearance upon its cartons and in its advertisements and has caused the same to be shown in the advertising of its dealers.
- 22. Defendant has sold its said biscuit in cartons with cellophane windows devised and designed to expose the ends of its biscuit and calculated to deceive the public into believing that the contents of said box is the said biscuit of distinctive design and appearance of plaintiff.
- 23. The defendant has falsely represented and continues to represent that the contents of its cartons are "A Shredded Wheat Product" and are the "original" of said product which in fact was originated by plaintiff's predecessors.
- 24. Defendant's said imitation biscuit has on numerous occasions been passed off by storekeepers and restaurant proprietors as and for the said biscuit of plaintiff of distinctive design and appearance.
- 25. Customers in stores, restaurants, institutions and private homes have received and consumed the defendant's biscuit in the mistaken belief that it was the biscuit of plaintiff.
- 26. The acts of the defendant were intended to and do in fact deceive the public into the belief that the said biscuit of defendant is the biscuit of plaintiff.
- 27. The defendant has competed unfairly in interstate trade in the United States with plaintiff and has

perpetrated a fraud upon the public by manufacturing and selling in the channels of trade in the United States its biscuit made in imitation and simulation of plaintiff's biscuit of distinctive design and appearance.

- 28. The plaintiff has established the truth of all the material facts alleged in the bill of complaint.
- 29. The plaintiff has been diligent in notifying the defendant of its rights, of the violation thereof by the defendant and in promptly bringing action to prevent infringement of its rights.

CONCLUSIONS OF LAW.

- 1. The Court has jurisdiction of the parties and the issues raised under the pleadings.
- 2. The distinctive form, shape and appearance of the plaintiff's biscuit has acquired a secondary significance as representing the product of the plaintiff.
- 3. The whole wheat biscuit manufactured and sold by defendant is made in imitation and simulation of the plaintiff's biscuit and by such manufacture and sale defendant has been guilty of unfair competition in trade in the United States in interstate commerce with plaintiff and of the perpetration of fraud upon the public.
- 4: The words "Shredded Wheat" have acquired a significance as meaning only the product of plaintiff.
- 5. The representation or picture of plaintiff's biscuit of distinctive design and appearance shown in a saucer or dish is a true trade-mark for said biscuit and plaintiff is vested with the exclusive right in and to the same.
- 6. Defendant has infringed upon trade-marks of plaintiff, consisting of the words "Shredded Wheat"

and the representation of a biscuit placed in a saucer or dish and has been guilty of unfair competition in trade with plaintiff and the perpetration of fraud upon the public.

- 7. The plaintiff is entitled to the relief prayed for in the complaint.
- 8. Plaintiff is entitled to an injunction against the defendant, its officers, agents, attorneys, workmen, employes, its successors or assigns, and all others acting by or under its direction or authority perpetually restraining and enjoining all of them and each of them, from directly or indirectly
 - (a) Manufacturing or selling whole wheat biscuit made in imitation or simulation of the said whole wheat discuit of the plaintiff of particular and distinctive shape, appearance and structure;
 - (b) Employing upon cartons or advertisements or otherwise the words "Shredded" or "Shredded Whole Wheat" in connection with said biscuit;
 - (c) Employing in advertising or upon cartons containing its biscuit a cut or picture of said biscuit in simulation of the plaintiff's biscuit, either alone or in association with the word "Shredded";
 - (d) Using or employing on packages or in advertising or otherwise the trade-mark "Shredded Wheat" or a simulation or colorable imitation thereof:
 - (e) Using or employing on packages or in advertisements or otherwise the trade-mark consisting of the representation of the plaintiff's biscuit of particular and distinctive shape, design and appearance, placed in a saucer or dish or a simulation or colorable imitation thereof;

- (f) Representing that defendant's product is the "original" of Shredded Wheat Biscuit;
- (g) In any other manner or by any other device aiding, assisting or inducing others to advertise, sell, pass or palm off the defendant's whole wheat biscuit as and for the whole wheat biscuit of the plaintiff of distinctive design and appearance.
- 9. The plaintiff has not been guilty of laches.
- 10. Plaintiff is entitled to an accounting against the defendant of all of defendant's profits, gains and advantages and the damages suffered by plaintiff by reason of defendant's said acts of unfair competition.
- 11. Plaintiff is entitled to recover its costs to be taxed.

Respectfully submitted,

HUGH M. MORRIS, Solictor of Plaintiff.

DRUBY W. COOPER, CHARLES A. VILAS, THOMAS J. BYRNE, HENRY J. SAVAGE,

Of Counsel. August 1, 1933.

DEFENDANT'S PROPOSED FIND INGS.

(Filed September 30, 1933.)

Defendant presents the following as its proposed Findings of Fact and Conclusions of Law to be made by the Court. .

FINDINGS OF FACT.

- 1. Plaintiff is a corporation of the State of New Jersey.
- 2. Defendant is a corporation of the State of Delaware.
- 3. Plaintiff was organized in the year 1898 and in 1930 purchased the business of The Shredded Wheat Company but did not announce its successorship on its cartons or packages of shredded wheat.
- 4. The history of The Shredded Wheat Company is as follows: Cereal Machine Company was incorporated under the laws of the State of Colorado on June 8, 1893. Henry D. Perky was the founder of the business and was its president. On or about the 17th day of May, 1900, the name Cereal Machine Company was changed to The Shredded Wheat Company; in 1900 the Natural Food Company was organized as a corporation under the laws of the State of New York. The Natural Food Company changed its name on the 5th of May, 1908, to The Shredded Wheat Company.
- 5. Perky's original idea and plan was to sell machines for shredding cereals and other products in the kitchen.

- 6. One of the products of Perky's shredding machine was shredded wheat on which he applied for and obtained United States Letters Patent covering the product, its design, the process of making it, and special machinery for its manufacture.
- 7. Up to the year 1915, and later, plaintiff's predecessors carried, printed prominently upon the packages of said shredded wheat, the following notice:

Patented, September 17, 1895, October 15, 1895. This Food, The Process of Making it. The Special Machinery for Its Manufacture are Under The Protection of The United States Government By Virtue of Many Patents As Follows:

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502378
        August
                   1, 1893
                               532698
                                      January
                                                 15, 1896
520496
        May
                   29, 1894
                               533551
                                                  5, 1896
                                       February
521810
                  26, 1894
        June
                               533552
                                       February
                                                  5, 1895
532286
       January
                 8, 1895
                               533553
                                                  5, 1895
                                       February
532480
       January
                  15, 1895
                              -533554
                                       February
                                                  5, 1895
                  15, 1895
532481
        January
                               533555
                                       February
                                                  5, 1895
532697
       January
                  15, 1895
                               533821
                                       February
                                                  5, 1895
 24688 September 17, 1895
                               287285
                                       June
                                                  7, 1898
548086 October 15, 1895
                               614338
                                       November 15, 1898
548087 October
                  15, 1895
                               618288
                                       January
                                                 24, 1899
 25318 March .
                  31, 1896
                               625696
                                       May
                                                 23, 1899
571284 November 10, 1896
                               681656
                                       May.
                                                 27, 1901
571285 November 10, 1896
                               35511
                                      December 31, 1901
593745 February
                   8, 1898
                               684788
                                      October
                                                 22, 1901
685671 October
                  29, 1901
                               681655 August
                                                 27, 1901
683100
        September 24, 1901
                               713795
                                      November 18, 1902
684789 · October ·
                  22, 1901
                               746145
                                      December
                                                  8, 1903
683101 September 24, 1901
                               770159
                                      September 14, 1904
678127 July
                   9, 1901
                               797604
                                      August
                                                 22, 1905
667892
       February
                  12, 1901
                               785554
                                      March
                                                 21, 1905.
678625
        July
                  16, 1901
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8. The said patents gave to the plaintiff's predecessors a monopoly in the manufacture and sale of said food product.

- 9. The product made by the plaintiff and its. predecessors is wheat formed into shreds and baked in the form of a pillow-shaped loaf.
- 10. The words shredded wheat were first used in connection with said product about January 1, 1894.
- 11. The words shredded wheat accurately describe said product.
- 12. The pillow-shaped loaf is the necessary and unavoidable product of the said Perky special patented machinery for the manufacture thereof.
- 13. The patents set out in paragraph 7 above, the numbers of which appeared appended to the notice on the package of plaintiff's predecessor until 1915 and after, have all expired and the principal Perky patents expired in 1912.
- 14. Shredded wheat biscuit was the only name by which said product was known during the existence of such patents.
- 15. The pillow form of plaintiff's biscuit is illustrated and described in the Perky design patent No. 24,688 of September 17, 1895.
- 16. No secondary meaning of the name shredded wheat as designating plaintif's manufacture rather than the pillow-shaped biscuit itself has been shown.
- > 17. The name shredded wheat is understood to describe the product and does not indicate origin of manufacture.
- 18. Shredded wheat is the only current or known descriptive name for the products of both parties.

- 19. The pillow-shaped biscuit is the necessary result of the process and machinery of manufacture used by plaintiff and defendant.
- 20. The mechanical structure of the loaf is functional. The two long edges result from the squeezing or welding together of the cut shreds of the biscuit and serve to bind the shreds of the biscuit together and to shape them into loaf form and appearance. The shreds are porous and capable of absorbing several times their weight in milk or cream. The shreds are relatively separated except at their welded ends and thus facilitate easy crushing of the biscuit when being consumed. The shredded form and structure of the biscuit permits it to rise or puff up under heat without the use of yeast, baking powder, shortening or leaven.
- 21. The pillow-shaped form of the biscuit has no significance as indicating origin of manufacture.
- 22. The illustration of two shredded wheat biscuits in a bowl, appearing on the plaintiff's package, is merely descriptive advertising and does not indicate origin of manufacture.
- 23. Plaintiff has applied for and secured the following trade-mark registrations:
 - 1. No. 52,858, registered May 22, 1906, consisting of the Goddess "Ceres" with a torch in one hand and askeaf of wheat in the other. Use claimed since January 1, 1894.
 - 2. No. 85,186, registered January 30, 1912, for a picture of a saucer containing a shredded wheat biscuit, milk and a spoon. The registration states, "No claim being made to the representa-

tion of a shredded wheat biscuit", referring to the biscuit shown in the saucer. Use is claimed "since Sept. 15, 1909".

- 3. No. 89,071, registered November 5, 1912, consisting of the representation of plaintiff's Niagara Falls factory and the phrase "The Home of Shredded Wheat". The registration states that the trade-mark is used "for shredded wheat", and also that "no claim is made herein to the words 'The Home of Shredded Wheat". Use is claimed since March 1, 1910.
- 4. No. 216,593, registered August 17, 1926. The alleged trade-mark is displayed as a saucer containing two shredded wheat biscuit. Use is claimed since September 15, 1909. The registration states that "Applicant disclaims any exclusive right to the representation of two biscuits apart from the mark shown in the drawing".

The above described registrations were all issued under the Trade-mark Act of February 20, 1905. The following registrations were procured under the Trade-mark Act of March 19, 1920:

- 5. No. 178,725, registered January 15, 1924. The alleged trade-mark is displayed as the words "Shredded Wheat", for biscuit or crackers and use as a trade-mark is claimed since January 1, 1894.
- 6. No. 213,456, registered May 25, 1926. The alleged trade-mark is displayed as the words "Shredded Wheat" for use on goods described as "biscuits, crackers, and cereal foods cooked or prepared for onsumption". Use of the alleged trade-mark is claimed since January 1, 1894.

- 24. Plaintiff up until 1915, and later, associated with its carton and biscuit its registered trade-mark No. 32,858, representing the goddess Ceres.
- 25. Plaintiff, since approximately 1908, has prominently associated with its packaged product or advertising the words "Niagara Falls", and the representation of Niagara Falls.
- 26. Plaintiff for many years since 1910 has associated with its packaged product the picture or representation of its factory at Niagara Falls, called by it "The Home of Shredded Wheat".
- 27. Plaintiff since 1927 has prominently printed upon and prominently associated with its cartons and cases of shredded wheat the word "original".

Plaintiff's product is known in the trade to many grocers and users as Niagara Shredded Wheat or Original Shredded Wheat.

- 28. Defendant is successor in business of Kellogg's Toasted Corn Flake Company and operates a factory in Battle Creek, Michigan.
- 29. From 1912 to 1919, defendant manufactured and sold a shredded biscuit made out of wheat flour and flavored. This biscuit was marketed in cartons marked "Kellogg's Toasted Wheat Biscuit". These cartons during most of the period from 1912 to 1919 carried the words "Shredded" on the panel.
- 30. Defendant first marketed its small size shredded wheat biscuit in the Fall of 1921. The marketing of this product was continued until the Fall of 1922, when its marketing was interrupted until the Fall of 1927.

- 31. Defendant's shredded wheat biscuit was marketed during the period from the Fall of 1921 until the present time in cartons marked "Kellogg's Shredded Wheat Biscuit".
- 32. Since July, 1930, defendant has also marketed its small shredded wheat biscuit in cartons marked "Kellogg's Whole Wheat Biscuit". Both the Kellogg's Shredded Whole Wheat Biscuit and the Kellogg's Whole Wheat Biscuit have been marketed concurrently by defendant since July, 1930, and are still being marketed.
- 33. The general appearance, printing and decorative effects and colors of plaintiff's and defendant's cartons are distinctly different.
- 34. The name "Shredded Wheat" on defendant's packages has always been accompanied with the name Kellogg and defendant's corporate name in conspicuous type.
- 35. Defendant's use of an illustration consisting of two biscuits in a bowl is descriptive of defendant's product and explanatory of its use.
- 36. Defendant's packages bear no resemblance to the plaintiff's and could not be mistaken therefor.
- shaped but about two-thirds the size of plaintiff's and is darker in color and is readily distinguishable from plaintiff's as to size, color and taste.
- 38. There is no practical method of distinction apart from the cartons other than those of size, color and taste as voluntarily adopted by the defendant.
 - 39. Neither plaintiff nor defendant sells finished shredded wheat biscuit loose or in bulk, but only packaged in cartons.

- 40. Defendant makes and sells only one size of shredded wheat biscuit and plaintiff two sizes, one of which is similar in size to defendant's biscuit.
- 41. Plaintiff's large or regular size biscuit has been made and sold by plaintiff, substantially unchanged in size, for approximately forty years.
- 42. Plaintiff's small size shredded wheat biscuit was first marketed by plaintiff in or about June of 1932.
- 43. Defendant first began to manufacture its small size shredded wheat biscuit in the Fall of 1921 and, with the exception of approximately five years between the Fall of 1922 and the Fall of 1927, has continuously made, packaged and sold its said small size biscuit since 1921.
- 44. From 1912, until interrupted about 1919 by War regulations, defendant marketed a shredded biscuit made from wheat dough and described the same on its cartons as "Shredded".
- 45. Plaintiff's large or regular size shredded biscuit is and always has been packaged twelve biscuits to the large carton and two biscuits to the small or so-called "individual" and sample cartons, but plaintiff's small size biscuit has never been packaged or sold by plaintiff in the large or twelve biscuit cartons, but solely in the small so-called individual or two-biscuit cartons.
- 46. The distribution of plaintiff's said small size biscuit, in said two-biscuit cartons, has been confined by plaintiff to the restaurant, lunchroom and hotel trade.
- 47. Plaintiff announced this new size of biscuit to the jobbing trade in a letter reading as follows:

"NATIONAL BISCUIT COMPANY UNEEDA BAKERS

Denver, Colorado, June 2, 1932.

To All Jobbers:

We have put out a smaller sized Shredded Wheat biscuit in Individual Cartons, for restaurant use, and these are listed at \$1.35 per case of 72, your regular discount applies.

We will continue to carry our regular size biscuit in Individual Cartons at \$1.60 per case of 72.

Our reason for this change has been the fact that there has been a smaller biscuit put out by one of our competitors and some of the restaurant trade have been confused with the thought that our price was out of line.

In ordering out this merchandise please designate 'Small Size' for the new cartons and 'Large Size' for the standard cartons. We know, there are a great many restaurants who do not care to change because the consumer in general is used to the larger size biscuits but we want your salesmen to be in line with competition on price, and if this new package is used only when needed it will serve its purpose.

We will see that our salesman shows you samples.

Yours very truly,

NATIONAL BISCUIT COMPANY, (signed) C. K. BRUCE, Manager."

48. Both parties encourage or push the sale of their regular size shredded wheat biscuit to the restaurant, lunchroom and hotel trade in their individual cartons, and neither party desires nor encourages the service of its biscuit in hotels, lunchrooms or restaurants apart from their cartons.

49. Approximately 97½% of defendant's trade is supplied with its biscuits in the large fifteen-biscuit

cartons. The remaining 2½% is divided into two parts; 98% of this 2½% receives the biscuits in individual service cartons; the remaining 2% of this said 2½% of defendant's total business are served with its small size biscuits apart from their cartons.

- 50. Neither plaintiff nor defendant desires, encourages or controls the sale of their biscuit apart from their cartons and it has not been proved that the biscuit are so served for any improper purposes.
- 51. As far as the record discloses, no purchaser has ever mistaken defendant's package for plaintiff's.
- 52. As far as the record discloses, no purchaser has ever mistaken defendant's shredded wheat biscuit for plaintiff's when purchased apart from the carton.
- 53. The defendant's product is known to the trade and public as a product of different origin competing with plaintiff's.
- 54. Large numbers of dealers advertise in newspapers, circulars and otherwise substantially as follows: "Shredded Wheat, Niagara or Kellogg's."
- 55. There is no testimony showing any deception, passing off, or confusion between defendant's goods and plaintiff's.
- 56. Defendant's predecessor marketed a shredded biscuit from 1912 until interrupted by war conditions in 1919. It advertised this biscuit as shredded. Defendant's present small shredded wheat biscuit was first marketed from the Fall of 1921 until the Fall of 1922 when operations were interrupted until the Fall of 1927, since which time defendant has continuously marketed its small shredded wheat biscuit as Kellogg's Shredded Wheat Biscuit. The Shredded Wheat Com-

pany sued two of defendant's dealers in Connecticut in the Spring of 1928. After depositions were taken in 1928, the Shredded Wheat Company moved no further until that suit was ripe for dismissal for want of prosecution in the Summer of 1930. The present plaintiff had acquired the business of the Shredded Wheat Company in 1929 and on its initiative the said action was dismissed without prejudice. At and prior to the time of the dismissal, defendant was marketing its shredded wheat under the two names of Kellogg's. Shredded Wheat Biscuit and Kellogg's Whole Wheat Biscuit and it has since continued to market its biscuit under said names without cessation or change. present action was started in the Spring of 1932 and tried in the Spring of 1933, depositions having been taken during the Winter of 1932-33. Defendant's business has grown from zero in the Fall of 1927 to a volume which exceeds plaintiff's volume in many stores and greatly exceeds plaintiff's volume in self-service stores.

- 57. Plaintiff and its predecessors have known of defendant's operations and manufacture of shredded biscuit from wheat since 1912, i. e., for twenty-one years.
- 58. Plaintiff's predecessor filed application to register the words "Shredded Whole Wheat" as a secondary-meaning trade-mark under the ten-year clause of the 1905 Trade-mark Act. Its application was opposed by William E. Williams. The opposition was sustained by the Patent Office and on final appeal the judgment of the Patent Office was affirmed in all respects by the Court of Appeals of the District of Columbia.
- 59. Plaintiff did not announce in connection with its use of its alleged trade-marks in issue, its succession to the business of the Shredded Wheat Company.

CONCLUSIONS OF LAW.

- 1. The name "Shredded Wheat" is descriptive of the goods of both parties.
- 2. The fame "Shredded Wheat" is the generic name for the product of the Perky patents and is open to public use.
- 3. Defendant, has the right to make shredded wheat biscuit and to use the name Shredded Wheat.
- 4. The pillow-shaped form of biscuit became open to public use upon the termination of Perky design patent No. 24,688 of September 17, 1895, and of the process product and machine patents relating thereto and listed by plaintiff's predecessor on packages thereof.
- 5. Defendant has the right to make shredded wheat biscuit in a pillow-shaped loaf.
- 6. Plaintiff has no trade-mark right in the words "Shredded" and "Shredded Wheat".
- 7. Plaintiff has no trade-mark right in the form of shredded wheat biscuit.
- 8. Defendant is guilty of no unfair competition against plaintiff by using the words "Shredded" and "Shredded Wheat".
- 9. Defendant has been guilty of no unfair competition with plaintiff by making shredded wheat in the form of a pillow-shaped loaf.
- 10. Defendant has not infringed any of plaintiff's rights or competed unfairly with it by displaying on its packages the illustration of its goods in a bowl.

- 11. Plaintiff has been guilty of the conduct of which it complains of defendant by adopting defendant's small size of biscuit for use in the only trade in which biscuit are occasionally sold apart from their cartons.
- 12. Plaintiff, by adopting and thus wiping out defendant's size distinction, has estopped itself to ask the imposition of additional distinctiveness upon defendant's biscuit even if it had been proved that additional distinctiveness were possible and practical.
- 13. Plaintiff has acquiesced in defendant's operations.
- 14. Plaintiff has not come into court with clean hands.
- 15. Plaintiff, by marking its carton with patent notices until 1915 and later, has estopped itself to allege that its product was not a patented product and subject to the operation of law as such.
- 16. Plaintiff, by disclaiming the representation of a shredded wheat biscuit as a trade-mark in 1912, precluded itself from ever thereafter setting up trademark claims in the appearance, form, or illustration of the biscuit.
 - 17. Plaintiff, by disclaiming in 1912, the words "The Home of Shredded Wheat" as a trade-mark "for shredded wheat", precluded itself from thereafter setting up a claim of trade-mark rights in said words "shredded wheat".
 - 18. It has been conclusively adjudged as against plaintiff's predecessor, that the words "shredded

wheat" are descriptive and not capable of appropriation and use as a trade-mark, and not in fact used as a trade-mark by plaintiff's predecessor.

19. Plaintiff's bill of complaint should, therefore, be dismissed for want of equity at plaintiff's cost.

Respectfully submitted,

Ward & Gray, Wilmington, Delaware, Solicitors for Defendant.

CRICHTON CLARKE,
EDWARD S. ROGERS,
ARTHUR B. SEIBOLD,
J. CARLISLE SWAIM,
E. ENNALLS BERL,
Of Counsel.

PLAINTIFF'S PRÆCIPE FOR TRANSCRIPT.

(Filed February 20, 1935.)

Please incorporate into the transcript on appeal in the above-entitled cause the following portions of the record, to-wit:

- 1. The docket entries.
- 2. Bill of complaint.
- 3. Answer of defendant.
- 4. Plaintiff's reply to defendant's affirmative defense.
- 5. Plaintiff's interrogatories and exhibits attached thereto and defendant's answers to said interrogatories. (To be printed together with answer following interrogatories, the exhibits to be printed in black and white.)
- 6. Condensed record of the proceedings at trial in narrative form with order of approval by the Court.
- 6-à. Plaintiff's requests for findings of fact and conclusions of law.
- 6-b. Defendant's requests for findings of fact and conclusions of law.*
- 7. Plaintiff's Exhibits Nos. 10, 83, 84, 85, 114, 115, 149, 150, 202, 239, 241-245 (photos), 247, 248, 252.
- 8. Defendant's Exhibits Nos. 79 and Patent No. 548,086 from Exhibit 242.
 - 9. Opinion of Court.

- 10. Final decree.
- 11. Plaintiff's petition for appeal.
- 12. Assignment of errors.
- 13. Order allowing appeal.
- 14. Bond on appeal.
- 15. Citation.
- 16. This precipe for transcript of record and acknowledgment of the service thereof.

(Sgd.) Hugh M. Morris,
Solicitor for Plaintiff-Appellant.
(Sgd.) Charles A. Vilas,
Of Counsel for Plaintiff-Appellant.

To: H. C. Mahaffy, Jr., Esq., Clerk, United States District Court, District of Delaware.

Service of a copy of the foregoing præcipe acknowledged this twentieth day of February, A. D. 1935.

> (Sgd.) E. Ennalls Berl, Solicitor for Defendant-Appellee.

DEFENDANT'S ADDITIONAL PRÆCIPE.

(Filed April 23, 1935.)

Please interporate into the transcript of record on appeal in the above-entitled cause, the following portion of the record in addition to those included in the plaintiff's præcipe:

- 1. Plaintiff's Exhibits Nos. 9, 11, 237, and 251 (addition to paragraph 7 of plaintiff's præcipe).
- 2. Defendant's Exhibits Nos. 9, 10, 95, 168, 121, 122, 126, 222, 234, 235, 236, 242, 243, 244 and 245 (addition to R. 8 of plaintiff's præcipe).

(Sgd.) E. Ennalls Berl, Solicitor for Defendant-Appellee.

To: H. C. Mahaffy, Jr., Esq., Clerk, United States District Court, District of Delaware.

Service of copy of foregoing pracipe acknowledged this twenty-third day of April, 1935.

(Sgd.) Hugh M. Morris, Solicitor for Plaintiff-Appellant.

CLERE'S CERTIFICATE.

United States of America,
District of Delaware,

\$\int_{SS.}:\$

I, HENRY C. MAHAFFY, JR., Clerk of the District Court of the United States for the District of Delaware, do hereby certify that I have carefully compared the writings annexed to and accompanying this certificate, in five volumes, viz:

Volume I, Pleadings and Testimony, pages 1 to 698, inclusive:

Volume II, Pleadings and Testimony, pages 699 to 1386, inclusive;

Volume III. Pleadings and Testimony, pages 1387 to 2066, inclusive;

Volume IV, Exhibits, pages 1 to 208, inclusive; Volume V, Exhibits, pages 1 to 516, inclusive;

and find the same to be true and correct copies of their respective originals so full and complete as the same now remain on file and of record in my office, being a complete exemplification of the record and proceedings in the case of National Biscuit Company, Plaintiff, v. Kellogg Company, Defendant, No. 980 in Equity, pending in said Court, made up in accordance with the præcipes of counsel for the respective parties filed in said cause.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court at (Seal) Wilmington, in said district, this thirtieth day of July, A. D. 1935, and the Independence of the United States of America, the one hundred and sixtieth.

(Sgd.) H. C. MAHAFFY, JR., Clerk, U. S. District Court, District of Delaware.

